Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1370

KATHLEEN HACKETT, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

v.

GENERAL HOST CORPORATION,
CONTINENTAL BAKING COMPANY,
WILLIAM FREIHOFER BAKING COMPANY,
HUBER BAKING COMPANY, INC.,
SCHAIBLE'S BAKERY,
STROEHMANN BROTHERS COMPANY,
WARD FOODS, INC.,

Respondents.

Petition of Kathleen Hackett, on Behalf of Herself and All Others Similarly Situated, for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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v.

GENERAL HOST CORPORATION,
CONTINENTAL BAKING COMPANY,
WILLIAM FREIHOFER BAKING COMPANY,
HUBER BAKING COMPANY, INC.,
SCHAIBLE'S BAKERY,
STROEHMANN BROTHERS COMPANY,
WARD FOODS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on January 14, 1972, a petition for rehearing in banc having been denied on February 17, 1972.

OPINIONS BELOW.

The order of the district court was accompanied by an unreported memorandum opinion, a copy of which is appended hereto, *infra* at A38.

The order of the district court denying petitioner's request for modification of the original order to provide for certification of appeal under 28 U.S.C. § 1292(b) (1970) is appended hereto, *infra* at A45.

The opinion of the court of appeals is as yet unreported. A copy of the opinion is appended hereto, *infra* at A1.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 14, 1972. A petition for rehearing in banc was denied on February 17, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED.

1. Did the court below err in dismissing the appeal and holding that the district court's refusal to confirm the class did not constitute a final, appealable order within the meaning of 28 U.S.C. §1291 (1970), where the effect of the district court's decision was to relegate the prosecution of a complex antitrust case brought for price fixing of bread to a single claimant without the economic incentive or resources to carry on the litigation?

2. Did the court below, in treating the notice of appeal and briefs as a petition for mandamus under 28 U.S.C. § 1651(b) (1970), err in holding that the district court's refusal to confirm the class on the ground of unmanageability was within the scope of permissible discretion under Rule 23(1)(c) of the Federal Rules of Civil Procedure, where the district court's opinion failed to set forth any of the factors which prompted the decision, and, thus, was devoid of any foundation for review?

STATUTES AND RULES INVOLVED.

The statutory provisions involved are 28 U.S.C. § 1291 (1970); §§ 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1 and 2 (1970); and § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1970). The rules involved are Rule 23 of the Federal Rules of Civil Procedure and Local Rule 45 of the United States District Court for the Eastern District of Pennsylvania. The texts of these provisions are set forth herein, *infra* at A46.

STATEMENT OF THE CASE.

Petitioner, as a consumer of bread, instituted this treble damage class action in the District Court for the Eastern District of Pennsylvania on behalf of herself and all other individual purchasers of bread within the Philadelphia Market alleging a conspiracy by respondents to fix the prices and terms of sale of bread in the Philadelphia Market in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1970).[1]

The complaint was prompted by, and its allegations were virtually identical to, an indictment returned against respondents in the United States District Court for the Eastern District of Pennsylvania on March 13, 1968.[2] As defined in the indictment and complaint, the Philadelphia Market consists of the City of Philadelphia, surrounding counties in Pennsylvania and a number of adjacent counties in southern New Jersey and Delaware.

The complaint alleged a conspiracy from 1964 through 1968, during which the respondents' sales within the relevant market were approximately $40,000,000.00 annually, affecting approximately 1,500,000 purchasers of bread and potential plaintiffs in the class.

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1. The specific class alleged consists of:

> [A]ll individual consumers situated in the Philadelphia Market . . . who have purchased at retail, for their own consumption and consumption by members of their household and not for resale . . . [pan-baked bread] . . . and who have sustained damages as a result of the conspiracy herein alleged.

(*Infra* at A31; Comp., ¶ 3A)

2. "The aforementioned combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been to raise and maintain prices of bread and to fix and stabilize other terms and conditions for the sale of bread in the Philadelphia Market." Indictment, *United States v. General Host Corp., et al.*, Crim. No. 23200 (E.D. Pa., March 13, 1968). (*Infra* at A52).

In the criminal proceedings, all of the respondents entered pleas of *nolo contendere*. Certain individual officers named as defendants in the criminal proceedings were fined, given suspended sentences and placed on probation.

The civil case was assigned to the Honorable Charles R. Weiner who had presided at the criminal prosecution. Prior to the closing of the pleadings, and following a pre-trial conference, Judge Weiner entered a stay of all proceedings pending a determination, pursuant to local Rule 45(c) of the Eastern District of Pennsylvania,[3] as to whether the case should proceed as a class action. The issue was briefed by both parties, and respondents, in addition, filed certain affidavits in opposition to the class action. On respondents' own papers it was uncontested that there were approximately 1.5 million potential claimants and that the average claim would be $9.00. The Court proceeded with oral argument on the class action issue and on July 31, 1970, rendered its decision dismissing the class action allegations without requiring any factual discovery or any preliminary hearings as to the feasibility of the case as a class action.

Petitioner subsequently requested the district court to certify, pursuant to 28 U.S.C. § 1292(b) (1970), the decision to the court of appeals. On August 25, 1970, the district court declined to issue the certification.[4] Petitioner thereafter filed a timely notice of appeal to the Third Circuit.

The case was argued in the Court of Appeals on October 21, 1971 before a panel consisting of Judges Aldisert, Gibbons and Rosenn. On January 14, 1972, the Court handed down its decision, in an opinion written by Judge Gibbons, with Judge Rosenn dissenting, holding that the district court's order denying confirmation of the class was interlocutory and dismissing the appeal.

On February 17, 1972, a petition for rehearing in banc was denied and this petition followed.

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3. *Infra* at A46.
4. *Infra* at A45.

REASONS FOR GRANTING THE WRIT.

1. In dismissing the appeal, the court below held that adverse class action determinations in suits brought pursuant to federal regulatory statutes which provide for the award of an attorney's fee upon successful prosecution are in all cases interlocutory and unappealable. This broad ruling on the issue of finality in the context of class action questions is in direct conflict with the decisions of the Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); and *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971), which recognize an exception allowing for appeal in cases such as the instant one.

Eisen involved a treble damage antitrust action brought pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all odd-lot purchasers and sellers on the New York Stock Exchange. The named plaintiff's individual damages were approximately $70.00. The district court refused to confirm the class and the plaintiff appealed. In the Court of Appeals the defendants moved to dismiss on the ground that the appeal was interlocutory. The Second Circuit denied the motion chiefly in reliance upon the decision of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), ruling: "where the effect of the district court's order, if not reviewed, is the death knell of the action, review should be allowed." 370 F.2d at 121. The decisive consideration was the court's conclusion that the adverse class action determination, if allowed to stand, would effectively terminate the lawsuit: "We can safely assume that no lawyer of competence is going to undertake

this complex and costly case to recover $70.00 for Mr. Eisen." 370 F.2d at 120.[5]

Petitioner submits that the test of finality applied in *Eisen* is more consistent with the principles set forth in *Cohen* than the all embracing rule of the court below. Under the decision in *Cohen*, an order which irreparably effects the basic rights of a party and which is sufficiently collateral to the merits so that subsequent decisions will not involve the same question is final for purposes of appeal. As demonstrated in the dissenting opinion of Judge Rosenn, these criteria are clearly met in the instant case: the class action question is collateral to the merits and petitioner's individual claim is too small to justify prosecution of the case in the face of an adverse determination on that issue.

The majority, however, predicated its decision that appeal was premature on the assumption that the availability of a statutory counsel fee for the successful prosecution of the individual claim was sufficient assurance that the action could proceed even in the absence of class representation. This assumption is so problematic as to constitute a fiction in conflict with the real world and at variance with the prag-

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5. In *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), the individual claim was under $1,000. In *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971), appeal was entertained as to a party with a claim of approximately $386 and dismissed as to another with a claim of $8,500. Intervening *Korn* were the decisions in *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969), and *Caceres v. International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970), dismissing appeals from adverse class action determinations. The death knell rule was distinguished on the ground that alleged treble damages of the named plaintiff in the *City of New York* were in excess of $1,500,000 and the average claim of the members of the class in *Caceres* was $150,000. The prosecution of both actions without class representation was concluded to be economically feasible.

See also *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971); *Weingartner v. Union Oil Co.*, 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), which give implicit recognition to the death knell exception.

matic test of finality announced in *Cohen* and followed by the Second Circuit in *Eisen, Green* and *Korn*. Indeed, that the rejection of the class may represent the death knell of the small consumer action is implicitly recognized by the majority when, in response to the dissent, the opinion states: "If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." (*Infra* at A14) This approach, however, cannot be reconciled with the irreparable injury test of *Cohen* and its focus on the rights of the immediate parties. On the contrary, the majority opinion recognizes that the rule announced involves a broader resolution of judicial policy, extending beyond the confines of this case, and a normative judgment regarding the importance of this type of consumer litigation.

The issues raised in this case, thus, present a direct conflict between circuits with regard to the concept of finality in the context of class actions and the larger question of policy with respect to consumer class actions. In view of the evolving importance of this area of federal practice and procedure, it is respectfully submitted that the conflict and policy questions should be resolved by this Court.

2. The opinion of the Court below also ignores the approach to questions of finality adopted by this Court in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1949), and *Gillespie v. U. S. Steel Corp.*, 379 U.S. 148 (1964), and cannot be reconciled with those cases. In those decisions, this Court set forth the basic principles to be followed in the twilight zone of finality. They are: (1) that a practical rather than technical construction should be adopted

in the determination of finality and (2) that in each particular case the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice on the other. The court below, however, in formulating a novel rule of class action finality, ignored these considerations in favor of a broad proscription against appeals of adverse class action determinations which rejects the case-by-case evaluation dictated by *Dickinson* and *Gillespie*. Under this test, the competing considerations are the Congressional policy of favoring private treble damage actions in the furtherance of the antitrust laws as against the need to insulate the courts of appeal from excessive interlocutory appeals. Petitioner submits that this unique application of the doctrine of finality as a method of docket control is at variance with this Court's approach to finality, which, although directed at insulating appellate courts from unnecessary burdens, is accomplished in a manner consistent with the just determination of the specific case before the court.

This Court has previously acknowledged that twilight questions of finality present difficult issues for resolution. The importance and volume of class action litigation pursuant to Rule 23 has again placed the question of finality into sharp focus in a new judicial setting, the resolution of which requires the attention of this Court. This need was recognized by Judge Friendly of the Second Circuit, who, in concurring in an application of the death knell rule in *Korn*, expressed the hope that the Courts of Appeal would receive new direction from this Court on the issue. *Korn v. Franchard Corp.*, 443 F.2d 1301, 1303 (2d Cir. 1971).

3. The decision of the court below raises important questions affecting the administration of the antitrust laws, as well as other important regulatory statutes such as the

securities and Truth In Lending legislation.[6] The majority below acknowledged that Rule 23 represents an extension by this Court, acquiesced in by Congress, of the deterrent policies of such statutes as § 4 of the Clayton Act. Moreover, in the recent case of *Hawaii v. Standard Oil Co.*, U.S. , 40 U.S.L. Week 4246 (March 1, 1972), this Court rejected the doctrine of *parens patriae* in favor of Rule 23 class actions as a method of redressing small, private antitrust claims, noting that the rule permits "citizens to combine their limited resources to achieve a more powerful litigation posture." U.S. at , 40 U.S.L. Week at 4250. Implicit is the recognition that many small individual antitrust claims simply cannot be prosecuted, because of the extraordinary expense involved and the economic resources of the defendants, except collectively through the device of a class action. The decision of the court below is in conflict with this declared policy and, if allowed to stand, will severely inhibit the maintenance of class action litigation in these vital areas of federal regulatory policy. Inhospitability to such litigation is clear in the majority's rule which discounts the stake that the plaintiff and the potential class have in the class action determination and whether the parties can proceed in "a more powerful litigation posture" and elevates the attorney and his prospect of a fee to the very center of the controversy.

Petitioner submits that no conscientious and competent attorney can justify the imposition of such lengthy litigation upon the judicial system where the only matters left at stake are the vindication of principle, a process rendered hollow in the absence of any economic detriment to the defendants, and the recovery of his own fee. If such a case were to have

6. Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1970); Securities Exchange Act of 1934, 48 Stat. 902, 15 U.S.C. § 78aa (1970); Truth in Lending Act, 82 Stat. 157 (1968), 15 U.S.C. § 1640(e) (1970).

any utility in the enforcement of the antitrust laws, then further prosecution might well be warranted. But as implicitly recognized in *Eisen*, and by Judge Rosenn, where the class is dismissed and the remaining claim is in its own right economically *de minimis*, there is patently no public or private purpose in pursuing the action. Absent either, the sole stakeholder would be counsel, who, we submit, should not pursue the litigation.

In the alternative, the majority suggests that the litigation could be prosecuted by public service law firms should private counsel prove unavailable. However, public service law firms should not be expected to expend their limited resources in the prosecution of consumer cases which have been deprived of any deterrent value for purposes of the antitrust laws by virtue of the trivial sums remaining at stake for the single plaintiff. The threat of such litigation could hardly be expected to deter violators who otherwise might be inhibited by the specter of substantial civil liability.

4. The decision below raises important questions concerning the scope and applicability of the newly amended Rule 23. Since its amendment in 1966, Rule 23 has developed into one of the most important of the Federal Rules of Civil Procedure. At that time, the A.B.A. Special Committee on Federal Rules of Civil Procedure expressed the hope that there would be prompt appellate review so that the contours of the rule would be clearly shaped and clarified. 38 F.R.D. 95, 104 (1965). Yet should the decision in this case refusing to recognize the death knell exception stand, the contours of Rule 23 with respect to consumer class actions may never be adequately developed, since an adverse decision on the class question would in most of the significant consumer cases be effectively and permanently insulated from appellate review.

5. The majority, in its alternative treatment of the appeal papers as a petition for mandamus, concluded without discussion that the district court's refusal to confirm the class was within the permissible limits of the discretion allowed by Rule 23(c)(1). Yet no evidence was presented by the respondents in the court below on the dispositive issue of manageability. The entire record on this issue consists of conclusory statements and argument of counsel that this consumer class would prove unmanageable. Moreover, since the district court did not adopt the "salutary" practice suggested in *Interpace Corp. v. Philadelphia,* 438 F.2d 401, 404 (3d Cir. 1971), of setting forth "at least a minimum articulation of the reasons for . . . [the] decision," its opinion also fails to shed any light on any of the considerations underlying the result.

The decision as to whether a particular class action is manageable presumably may not be grounded solely on the size of the class. Factors such as the geographical concentration of the members, the procedures available for notice and the complexity of the distribution system in the industry involved, i.e., whether the purchases were direct or indirect, are obviously relevant. The absence of any discussion of these or any other factors below should be contrasted with the extensive discussion of the manageability questions in *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2d Cir. 1968) (Eisen II), and *City of Philadelphia v. American Oil Co.,* 1971 CCH Trade Cases ¶73,625 (D. N.J. 1971). Thus the opinion of the district court, and the majority's failure to elucidate its conclusion that the ruling was not arbitrary, leaves this party and future litigants in this Circuit in the dark on the scope of the trial court's discretion on the issue of manageability under Rule 23. In view of the significance of class actions in the evolving areas of consumer redress, the decisions below raise important and timely questions for adjudication by this Court.

CONCLUSION.

The instant case evidences every requisite for a good faith consumer case. But the rockbed issue is whether it may proceed as a class action. The district court rejected the class on the basis of a *per se* determination of unmanageability predicated on the size of the class alone, a ruling made without findings, discussion or a record upon which the determination could be grounded. And because of the Court of Appeals' broad ruling on finality and against appeal, that decision is completely insulated from review and the case must founder. The implications of this result are of broad significance and affect important regulatory statutes and the evolving area of consumer class actions. It is respectfully submitted that these matters are timely and appropriate for resolution by this Court.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,320

KATHLEEN HACKETT, on behalf of herself and all others similarly situated,

Appellant

v.

GENERAL HOST CORPORATION,
CONTINENTAL BAKING COMPANY,
WILLIAM FREIHOFER BAKING COMPANY,
HUBER BAKING COMPANY, INC.,
SCHAIBLE'S BAKERY,
STROEHMANN BROTHERS COMPANY

and

WARD FOODS, INC.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 21, 1971

Before ALDISERT, GIBBONS and ROSENN,
Circuit Judges

OPINION OF THE COURT

(Filed January 14, 1972)

GIBBONS, *Circuit Judge.*

Kathleen Hackett, a consumer of bread purchased at retail, filed a complaint under Section 4 of the Clayton Act, 15 U.S.C. §15 (1971) seeking treble damages, costs and attorney's fees from the defendants for their alleged violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2 respectively. The defendants are seven bakers of pan-baked bread who sell such bread through various channels of distribution in the Philadelphia market area. Mrs. Hackett's complaint seeks recovery for injury to herself and to all other members of a class whom she claims to represent, consisting of all individual consumers in the Philadelphia market area who have purchased pan-baked bread from retail stores for their own consumption or for consumption by members of their family. The parties agree that her individual claim is for roughly nine dollars. She asserts that some one and one-half million purchasers of bread from retail stores, who purchased the bread involved for the use of some six million consumers comprise the class, of which she claims to be an appropriate class representative.

Mrs. Hackett's complaint was inspired by an indictment, *United States of America v. General Host Corp.*, Crim. No. 23,200 (E.D.Pa., filed Mar. 13, 1968), which charged that the defendants conspired to fix the prices and terms of sales of bread in the Philadelphia market. The district court accepted a plea of nolo contendere to that indictment. There is pending in the district court a civil action *Philadelphia v. General Host Corp.*, Civil No. 68-704 (E.D. Pa., filed Apr. 2, 1968) in which Philadelphia, on behalf of itself and various other public and private institutions, is

seeking recovery of the damages of such institutional purchasers occasioned by the alleged price fixing conspiracy.

The defendants moved for a pretrial conference and a stay of all proceedings until the district court should, pursuant to E.D.Pa. R. 45(c), determine whether the case should be maintained as a class action. *See* Fed. R. Civ. P. 23(c)(1). By an order dated May 4, 1970 and in accordance with Rule 23(c)(1), the district court fixed a schedule for the filing of affidavits and briefs dealing with the class action issue. On July 30, 1970, the court filed an opinion and order, the crucial provisions of which follow:

> "It is our considered opinion that under the facts of this case, the problem of management of the proposed class is clearly insurmountable. The class is so large that it would be unmanageable and could only result in knotty, complicated and unnecessary problems.
>
> ORDER
>
> The plaintiff's request for confirmation of her action as a class action is Denied."

Mrs. Hackett then requested the district court to amend the July 30, 1970, order to set forth a statement, pursuant to 28 U.S.C. §1292(b) (1971) that its decision on the class action issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal would materially advance the ultimate termination of the litigation. On August 25, 1970 the district court declined to issue such §1292(b) certification.

Mrs. Hackett then filed a notice of appeal. She contends that the July 30, 1970, order is a final appealable order within the meaning of 28 U.S.C. §1291. The defendants contend that the appeal is interlocutory and should be dismissed.

No request was made to the district court that the July 30, 1970, order be treated, for purposes of Fed. R. Civ. P. 54(b), as a dismissal of the complaint on behalf of the one and one-half million class members or for a determination and direction pursuant to that rule, that the order be entered as a final judgment. *Cf. Hayes v. Sealtest Foods Division of National Dairy Products Corp.*, 396 F.2d 448 (3d Cir. 1968).

Mrs. Hackett predicates her claim that this court must entertain her appeal upon the so called "death knell" rule of the Second Circuit which first appeared in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967). In that case Mr. Eisen sued both for himself and on behalf of all odd lot purchasers and sellers on the stock exchange. His individual claim amounted to only seventy dollars, and in a previous appeal in *Eisen* Judge Kaufman wrote:

> ". . . We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen.
>
> • • •
>
> Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate this litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." 370 F.2d at 120-21. (citations omitted)

The court in *Eisen* relied upon *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as authority for its "death knell" rationale. In this circuit we have referred to the *Cohen* rule as the "collateral order doctrine," and we have not been overly hospitable to requests for its exten-

sion. *See e.g., Borden Co. v. Sylk,* 410 F.2d 843 (3d Cir. 1969); *but cf Greene v. Singer Co.,* Civil No. 71-1835 (3d Cir., filed Nov. 2, 1971). We have not, however, ever been confronted directly with the problem of the appealability of a determination adverse to the confirmation of a class which leaves a single plaintiff to litigate a small claim for money damages.

Indeed no other circuit has had occasion either to adopt or expressly to reject the "death knell" rationale.[1] The experience of the Second Circuit has shown the application of the rule to be somewhat difficult. In *Green v. Wolfe Corp.,* 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), *Green* had an individual claim amounting to less than $1000 for overcharges on publically traded securities. The court held that an order dismissing the class action aspects of the complaint was appealable. In *City of New York v. International Pipe and Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969) and *Caceres v. International Air Transport Association,* 422 F.2d 141 (2d Cir. 1970) where the individual claims of the plaintiffs seeking to represent a class were $1,560,000 and $150,000, respectively, the court declined to apply the *Eisen* rule and dismissed the appeal. Most recently, in *Korn v. Franchard Corp.,* 443 F.2d 1301 (2d Cir. 1971), the court considered two appeals. In one the appellant Korn, whose individual claims totaled $386, appealed from an order revoking a class action designation. In the other, the appellant Millberg, and her husband, who was acting as her attorney, had claims totaling $8,500. Millberg appealed from an order denying class action designation. Korn's appeal was held to fall within the *Eisen* rule while Millberg's appeal was dismissed. These results disturbed Judge Friendly, who in concurring wrote:

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1. *Eisen* was considered in *Weingartner v. Union Oil Co.,* 431 F.2d 26 (9th Cir. 1970) but the court found a basis for distinguishing, rather than rejecting, its authority.

> "Since I regard Judge Feinberg's opinion as correctly applying the present law in this circuit, I concur therein. However, despite the obvious appeal of the 'death knell' doctrine, I am not sure it affords a rule that is truly workable or, indeed, is legally sustainable. If my fears should be realized, I might wish on some subsequent occasion to request that the court consider in banc whether we are not obliged to formulate a rule that will avoid the necessity of making such ad hoc judgments as have been required in these and other cases and also will afford equality of treatment as between plaintiffs and defendants. Perhaps, before occasion for doing this should arise, we shall have received enlightenment from the Supreme Court." 443 F.2d 1301 at 1307.

Judge Friendly's mention of equality between plaintiffs and defendants refers, of course, to the peculiarity of the "death knell" rationale that it operates only in favor of the plaintiff who has unsuccessfully sought to be designated as a class representative. It neither requires nor permits general supervision by the court of appeals over class action designations.[2] Indeed the rule operates in a very narrow area.

First, *Eisen* does not operate at all in those cases in which federal jurisdiction depends upon jurisdictional amount. In *Snyder v. Harris*, 394 U.S. 332 (1968) the Supreme Court rejected the contention that the revised Fed. R. Civ. P. 23 permitted aggregation of claims for purposes of jurisdictional amount. Since the court which developed the *Eisen* "death knell" doctrine has in *Korn v. Franchard Corp., supra*, drawn the survivability line as low as $8,500,

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2. *See* Note, *Interlocutory Appeal from Order Striking Class Action Allegations*, 70 Colum. L. Rev. 1292 (1970), which suggests that a broader interlocutory appellate remedy than that afforded by *Eisen, supra*, is required.

it is clear that in no case where a party with a $10,000 claim is before the court will the "death knell" doctrine be applicable. In the absence of a party's meeting the dollar-amount requirements under *Snyder v. Harris,* there will be no federal jurisdiction unless the claim falls within a category of federal question cases which may proceed without regard to such jurisdictional amount. *See Zahn v. International Paper Co.,* 40 U.S.L.W. 2237 (D.Vt., Sept. 30, 1971).

Secondly, *Eisen* is not needed to afford interlocutory appellate review in those cases in which the refusal to grant class action designation amounts to a denial of a preliminary injunction broader than would be appropriate for individual relief. 28 U.S.C. §1292(a)(1). *See e.g. Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496 (5th Cir. 1968); *Shapiro b. Bernstein & Co. v. Continental Record Co.,* 386 F.2d 426 (2d Cir. 1967); *Brunson v. Board of Trustees,* 311 F.2d 107 (4th Cir. 1962). This category of interlocutory appeals is adequate, we think, to protect against most district court inhospitability to class action litigation involving civil rights, the elective franchise, protection of the environment and the like. The *Eisen* rule is not likely to be needed in this area. Indeed the underlying assumption of *Eisen*—that no competent counsel would be willing to represent an individual small-claimant—is, whatever its validity, completely inapplicable to those numerous areas where the protection of rights incapable of measure in money is the primary object of the lawsuit.

Thus the "death knell" rule would operate only in that narrow category of cases where the object of the suit is the recovery of money damages, and where a statute affords federal jurisdiction regardless of amount. This narrow category is, however, significant for consumer advocates. But even in this field, the "death knell" rationale, based upon the assumption that no competent lawyer would under-

take a complicated case to recover a small amount of money, must be qualified by several considerations. A number of federal statutes provide for the award of counsel fees and costs.[3] Indeed the statute under which Mrs. Hackett sues contains such a provision. 15 U.S.C. §15 (1971). If the "death knell" is to ring for her case the rope is in her attorney's hand. There is no certain basis for the assumption that an interested holder of a small claim will be unable to prevail upon a private attorney to pursue that claim in the hope of being compensated by the award of "reasonable counsel fees" against a wrongdoer. Moreover the burgeoning in recent years of interest in publicly supported legal service organizations and of private support for legal aid and public interest law firms cannot be disregarded.[4] Many small but important claims heretofore, for purposes of litigation, beyond the pale of financial practicability, have been successfully litigated by such organizations in recent years. Thus an adverse class action decision may ring out as a death knell on far fewer occasions than superficial analysis would suggest.

This brings us precisely to the practicabilities of the operation of the "death knell" rule. It will operate primarily if not exclusively in that class of cases in which attorneys are willing to undertake on a contingent fee basis

3. *E.g.* statutes providing for damages arising from the following improper actions, a single instance of which may harm individual members of large classes, additionally provide that successful plaintiffs' attorneys shall be awarded reasonable attorneys' fees and costs: Failure to disclose under the Truth in Lending Act; 15 U.S.C. §1640 (1971); Unlawful wiretapping, 18 U.S.C. §2520 (1971). Other statutes place the decision of whether to allow reasonable attorneys' fees and costs within the discretion of the district court: Securities Acts Violations, 15 U.S.C. §§77k, 77www; 78i (1971). *See also* 28 U.S.C. §2678 (1971) providing for reasonable attorneys' fees in suits involving torts committed by the Federal Government where its immunity has been waived.

4. *See* Note, *The New Public Interest Lawyers*, 79 Yale L.J. 1068 (1970).

class actions for the recovery of money damages for claimed violations of federal regulatory statutes. These are chiefly the federal antitrust[5] and securities[6] statutes.

The chief policy argument in favor of a hospitable attitude toward such class actions is that they tend to reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement. Viewed in this light the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as §4 of the Clayton Act.[7] Even assuming such a deterrent policy, however, it must be balanced against the competing policies which have historically protected the federal appellate courts from being overwhelmed by interlocutory appeals.[8] And on the side of the balance opposed to interlocutory appellate review as of right must be weighed the existence and effectiveness of alternative discretionary appellate remedies with which to protect against excessive inhospitability of district courts to consumer class actions.

One of these is certification pursuant to 28 U.S.C. §1292(b) (1971). Another is an order certifying a case as final under Rule 54(b). It has been suggested that an order may not fall under both §1292(b) and Rule 54(b). C. Wright, *The Interlocutory Appeal Act of 1958,* 23 F.R.D. 199, 203 (1959). Whether this is true with respect to class

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5. Clayton Act §4, 15 U.S.C. §15 (1971).

6. Securities Exchange Act of 1934, §27, 15 U.S.C. §78aa (1971).

7. The decision in *Snyder v. Harris, supra,* would seem to indicate that the Court had a much more limited goal in mind when it promulgated the revised Rule 23. Allowing the aggregation of claims would have been more consistent with such an intention.

8. *See e.g.* Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542 (1969).

action determinations we need not here decide. *Cf. Hayes v. Sealtest Foods, supra.*[9] It suffices to say that by one route or the other a disappointed applicant for class action designation could, with the cooperation of the district court, in those rare instances where it might be appropriate bring before this court for review the questionable Rule 23 order. We have had no indication that the district courts of this circuit will reject applications under §1292(b) or Rule 54(b), arbitrarily or in disregard of the policy considerations favoring, where feasible, consumer class actions warranted by federal statutes. If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus. *See Interpace Corp. v. City of Philadelphia,* 438 F.2d 401 (3d Cir. 1971).

The advantage of restricting interlocutory appellate review of Rule 23 class action determinations to the §1292 (b), Rule 54(b), or mandamus routes is that in each instance at least one court and in the case of §1292(b), two courts, will exercise some discretion in the allowance of the appeal and weigh the countervailing considerations. With the exception of mandamus,[10] those discretionary routes were not open in 1949 when the Supreme Court decided *Cohen v. Beneficial Industrial Loan Corp., supra.* Since the Inter-

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9. In *Hayes, supra,* the court permitted the aspiring class representative to appeal the district court's refusal to confirm the described class at the time he appealed the dismissal of his complaint. To the appellee's objection that the time for appeal of the order refusing confirmation had elapsed, the court responded that, in the absence of Fed. R. App. Pro. 54(b) certification, it was not final *"at least* [not] in the sense that plaintiffs were precluded from appealing because they did not appeal within 30 days from the entry of such order." 396 F.2d at 449 (emphasis supplied). Although the court's opinion was a *holding* that such orders are not final only in the sense that it need not be appealed within thirty days, it strongly implies that they are non-final in a fuller sense, i.e., that they cannot be appealed.

10. Mandamus is only partially an exception, since its availability seems to have increased at least somewhat since *Cohen* was decided. *See* 9 J. Moore, *Federal Practice* ¶110.28.

locutory Appeals Act of 1958[11] and the 1963 Amendment to Rule 54(b)[12] there is less reason for enlarging those categories of orders which for purposes of appealability are deemed to be sufficiently "collateral" as to qualify under §1291.

Nor may our decision in *Greene v. Singer Co., supra* be considered as reflecting any basic change in our attitude toward enlargement of the *Cohen* doctrine.[13] In the *Greene* case we held that an order denying a defendant's motion to disqualify the plaintiff's attorney on the ground that he had previously represented the defendant in the matter which was the subject of the lawsuit was appealable under *Cohen*. Even that issue is a close one. *See* 9 J. Moore, *Federal Practice* ¶110.13 [10] at 189 et seq. The considerations favoring "collateral order" treatment in the *Greene* situation are different and more compelling than here. The decision appealed from in *Greene* allowed an attorney who had switched allegiance to represent the plaintiff, subject only to a protective order. The attorney's duty of loyalty was the matter in issue on the motion to disqualify, a mat-

11. Act of Sept. 2, 1958, Pub. L. No. 85-919, 28 U.S.C. §1292 (b), amending the original and expanding the category of permissible interlocutory appeals to include those from orders issued by a district court judge which are certified by him to involve "controlling question[s] of law as to which there is a substantial ground for difference of opinion," the interlocutory determination of which "may materially advance the ultimate termination of the litigation."

12. In 1961 Rule 54(b) was amended to make it clear that district courts possess the authority to enter a final judgment disposing of the claims of fewer than all the parties to an action. *See* 6 J. Moore, *Federal Practice*, ¶54.01 [12] at 7 (Supp. 1970).

13. In reaffirming our adherence to the rule of *Alexander v. United States*, 201 U.S. 117 (1906), Judge Aldisert wrote in *Borden Co. v. Sylk, supra:*

> "We have detected what appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more 'collateral' than 'final' orders." 410 F.2d at 845-46.

ter wholly separate from the merits of the lawsuit. Postponement of review of the order denying the disqualification motion until final hearing could have the effect of destroying the very subject matter—the duty of loyalty—which was the object of the collateral proceeding which resulted in the order appealed from.

This case could possibly be viewed as the reverse of an analogy to *Greene* since the decision refusing confirmation of the proposed class can be construed as one which, in effect, disqualifies Hackett's attorney from representing the one and one-half million other potential claimants.[14] Looked at as an order disqualifying an attorney, the order refusing to permit a class action confronts us with some practical problems of standing. The one and one-half million potential claimants are not before the court seeking the attorney's services. This contrasts with the *Greene* case, where the attorney's former client came before us seeking to preserve his duty of loyalty. Mrs. Hackett's disinclination to proceed with her lawsuit unless her attorney is allowed to represent many others besides herself does not move us to convert by an *ipse dixit* an order which as to her is clearly interlocutory into a final appealable order. We come down, then, to the question whether on the authority of *Greene v. Singer Co., supra*, or by a different *ipse dixit* we should recognize that the attorney deprived of the quixotic opportunity[15] of representing one and one-half

14. If one accepts the analogy, the fact that the instant case would be the mirror image of Greene could be important. In the Second Circuit, for example, it seems to be the law that an order disqualifying counsel is appealable while an order refusing to do so is not. *Marco v. Dulles*, 268 F.2d 192 (2d Cir. 1959); *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir. 1959). *But see Hamar Drive-In Theatre, Inc. v. Warner Bros. Pictures*, 239 F.2d 555 (1956).

15. Quixotic in the sense that for many attorneys it would truly be the impossible dream come true. Franks. *Rule 23-Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions*. 46 Chi.-Kent L. Rev. 1 (1969).

million potential claimants, should be recognized as a private attorney general with standing of his own to appeal the adverse class action decision. When all is said and done this pragmatically is the core issue, though conventional pieties about the role of the legal profession might suggest its obfuscation. Realistically, when we are asked to grant interlocutory appellate review of an adverse class action determination we are asked to recognize a separate interest of the attorney sufficient to bring the class action determination within the "collateral order" doctrine, or to recognize the standing of the attorney's client to assert such an interest on his behalf. We decline to do either. Those typical consumer class actions in which the *Eisen* rule would be likely to operate involve areas of federal law in which public enforcement co-exists with private remedies. There is no compelling need to go beyond those inducements to the bar which already encourage a lively pursuit of private enforcement remedies.

One part of Judge Rosenn's dissenting opinion requires special comment, since it points up a difference in approach to the proper role in society of the limited resources of the judicial process. He says that despite the statute providing for attorneys' fees in antitrust suits he:

> ". . . cannot believe that a capable attorney would press forward a complex anti-trust action when the amount in controversy is nine dollars . . . nor does the growth of public legal services, also cited by the majority, provide the means by which an individual litigant might secure legal representation. No publically-supported legal service organization could explain or justify the time and effort required to press a nine dollar anti-trust suit." (Dissenting opinion at 10) (footnotes omitted).

Judge Rosenn may well be right on both points. But, if so, the conclusion that the judicial process must therefore provide a mechanism, by making class action determinations appealable, whereby the lawsuit will be more attractive to attorneys' does not follow. If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight. As we pointed out hereinabove, the only instances in which the adverse class action determination will be made appealable under either the *Eisen* rationale or the "collateral order" rationale, will be those cases in which a federal regulatory statute permits a suit for money damages regardless of jurisdictional amount. In every such instance other regulatory mechanisms are available to assert the public interest against the wrongdoer. If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.

There remains for consideration whether on this record we should treat Mrs. Hackett's notice of appeal and briefs as a petition for mandamus and grant relief under 28 U.S.C. §1651 (1971). *See e.g. In re Harmon*, 425 F.2d 916 (1st Cir. 1970); *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963). As in *Interpace Corp. v. Philadelphia*,

supra, the district court's decision was within the limits of the discretion allowed by Rule 23(1)(c). The non-arbitrary exercise of that discretion will not be disturbed by the extraordinary remedy of mandamus.

In view of our conclusions on appealability we have no occasion to rule upon Mrs. Hackett's standing as a plaintiff under *Hanover Shoes, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). That issue was tendered by the defendants as additional support for the district court's order.

The appeal will be dismissed.

ROSENN, J., Dissenting.

Almost 25 years ago, Mr. Justice Jackson was impressed by the formidable volume of judicial writing on the issue of "the finality of a judgment for purposes of appeal." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1949). The passage of almost a quarter of a century and the promulgation of the new class action Rule 23 has not only added to the girth of the judicial writing on the subject but also to its convolutions.

I share with the majority some of their apprehensions for the judicial machinery because of the burdens, pressures and problems generated by the new Federal Class Action Rule. I do not believe, however, that the fear of potential abuses of the new Rule 23 should require us to hold that an order of the district court refusing confirmation of a class shall for all practical purposes be precluded from appellate review. In reaching such a conclusion, I do not pass judgment on the merits of this case nor on the propriety of the action of the district court in finding this class action unmanageable. I do believe, however, that this action is appealable.

I.

It is important to recharacterize the facts before us to show how they relate to the complex and confused question

of "finality" under Section 1291. In this case, a collateral order not going to the merits of the anti-trust claim has effectively terminated further consideration of the case on the merits. In reviewing it, there are two considerations to keep in mind: (1) the order under consideration is wholly collateral to the merits; and (2) its effect is to preclude consideration on the merits so that it affects the plaintiff's substantive case in a decisive, practical sense. Each of these considerations goes to separate definitions of "finality," each of which, in my opinion, is a sufficient ground for finding that there is an appealable, final order here.

THE COLLATERAL ORDER DOCTRINE

The Supreme Court in *Cohen v. Beneficial Finance Co.*, 337 U.S. 541 (1949) held that a decision of a district court, requiring a plaintiff in a derivative action to comply with the New Jersey statute ordering a posting of a bond to cover expenses, was: "[an] order [that] . . . did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." As a result, the order was considered "final" under Section 1291. There are essentially three elements that must be satisfied under the *Cohen* test: (1) the rights determined must be separable from and collateral to the merits of the case; (2) the question must be too important to deny review at this point; and (3) the time for review is ripe and cannot await the ultimate final judgment because the rights may be lost irreparably through the delay. 9 Moore's Federal Practice ¶ 110.10, at 133.

Subsequent cases clarified the scope of the *Cohen* rule. *Swift & Co. v. Compania Colombiana del Caribe*, 339 U.S.

684 (1950), held that the order of the district court vacating the attachment of a maritime lien was appealable under *Cohen*. The Court stressed two elements: (1) the issue was collateral to the merits; and (2) restoring the right to attachment and the lien at a later time "would be an empty rite." (Id. at 689) Shortly thereafter, *Roberts v. District Court*, 339 U.S. 844 (1950), held the denial of a petition to proceed in forma pauperis collateral and appealable under Section 1291. These two cases demonstrate that the important rights which may be lost through delay need not rise to the level of the constitutional questions involved in *Cohen*.

So long as the decision affects the basic right of the litigant to proceed or finally determines a claim separable from and independent of the substantive issues so that a later review of it when an appeal is taken from the final judgment on the merits becomes an empty rite, the *Cohen* test is met. This element of irreparably affecting important rights of a party to the litigation has become a cornerstone of the judicial approach to collateral order questions.

More recently, in *Diaz v. Southern Drilling Co.*, 427 F.2d 1118, 1123 (5th Cir. 1970), the Fifth Circuit noted that one important reason for allowing review of the default judgment against one of the parties in the case was that it affected the litigant's ability to "make important decisions about its further participation in this suit. . . ."

This approach to the appealability of a collateral order under Section 1291 is independent of any discretionary appeal under Section 1292(b).[1] If class action orders are collateral, appeal as of right would exist independently and exclusively of the 1958 Act. See Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1302-3 (1970).

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1. Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199, 203 (1959).

I conclude then that when an order will irreparably affect the basic rights of a party and is sufficiently collateral to the merits that subsequent decisions will not involve this question, it has sufficient finality under *Cohen* to be appealable under Section 1291.

Appellant meets those tests in this case. Her appeal is from a decision refusing to confirm the class she is attempting to represent. The basis for the decision is grounded solely on considerations of the proper administration of F.R. Civ. P. Rule 23. The determination in no way is dependent upon, or affects, rights asserted by the appellant under the Sherman and Clayton anti-trust acts. The district court's opinion that the class is unmanageable in no way resolves the substantive question of whether the appellees engaged in an anti-trust price fixing conspiracy that raised the retail price of bread in the Philadelphia area. The decision on manageability is final. Even if Mrs. Hackett were to proceed individually with her case, as is suggested, nothing more would ever be decided about the manageability of the class she once sought to represent. The record on that question is complete, the issue fully argued, and the decision based on the fullest consideration of the district judge. Review of that determination at this point by this court would not in any way invade the province of the district court in its determination of any of the issues still before it.

Furthermore, the district court's denial of the right to proceed as a class action has certainly affected the subsequent conduct of the litigation. Assuming that the suit will continue on the part of the appellant in her individual capacity, it is inconceivable that either the lawyers or the court will give a $9.00 suit the same consideration and attention due a class action involving hundreds of thousands of persons and many millions of dollars in potential

damages. If nothing else, it would be a waste of judicial resources to allocate extensive time to anti-trust litigation over this paltry sum. Even if the appellant had the economic power and her lawyers the fortitude to pursue this complicated anti-trust action for $9.00 against this group of bakeries, there would be a strong impulse on the part of the appellees to settle it and not incur the heavy legal fees generated by such an action.

Should the plaintiff proceed to judgment in her individual capacity, the parties would be bound by it, absent error of law. To the extent that the denial of the class action will affect how the case is litigated, the damage will be irreparable. This court's reversing the denial of the class will not permit the parties to reopen the judgment on the merits. To the extent this possible result compels the defendants to expend large sums defending the action, although it be for only $9.00, they too have been irreparably damaged if on appeal we confirm the denial of the class by the district court.[2]

THE TERMINATION OF LITIGATION DOCTRINE

(The *Dickinson, Gillespie, Eisen* Formulation)

The second consideration referred to in determining "finality" of judgment is that the order refusing to confirm the class action effectively terminates the litigation. This definition of finality was first developed in *Dickinson v. Petroleum Conversion Corp.*, supra, in which the Court had to decide whether an appellant had appealed in timely fashion from a decision of the district court. The issue turned on which of two decisions was "the final one" for

2. Moreover, if plaintiff wins the battle for her $9.00, she will likely lose the war to represent the class because she might be precluded from appellate review. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied 394 U.S. 928 (1969).

purposes of the litigation. In the first decision, all of the party's rights were adjudged, but the court reversed decision on apportioning the fund generated by the judgment awarding damages. The appellant did not appeal the first order but waited for the second judgment. The Court balanced "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other" (*Dickinson* at 511) and concluded that the appellant should have appealed from the first decision.

The decision did not mention *Cohen*, although *Cohen* had been decided only a year earlier. This is understandable because *Dickinson* dealt with appellate review of the merits of the case, not the collateral issue. The considerations involved in such a decision are different than under the *Cohen* rule. Finality in *Dickinson* meant that the merits of the case, insofar as the appealing party is concerned, are effectively determined. The case, as a whole, is at an end for him. Review does not interfere with the district court's jurisdiction because there is, for all intents and purposes, nothing more for the district court to do.

This line of reasoning was reaffirmed in *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964), in which the Court held that it had jurisdiction to review the denial of several causes of action under Section 1291. The mother of a dead seaman sued her son's employer under the Jones Act and under general maritime law in a wrongful death action. She joined as co-plaintiffs the decedent's dependent brothers and sisters. The district court struck off the general tort claim and held the siblings could not recover under the Jones Act, thereby foreclosing their participation in the action. The Court used the same balance struck in *Dickinson:* it looked at the inconvenience in piecemeal litigation as balanced against the danger of denying justice. More importantly, it added that the decision on the propriety of the district court's decision was "fundamental to the

further conduct of the case," (*Gillespie* at 153) and held a Section 1291 appeal proper.

Both of these cases illustrates that the Court was using a simple balancing of interests in determining when it should inject itself into appellate review of questions involving the principal matters in the case before the district court. Under this principle, "finality" meant a determination of whether the issue raised at an early stage of the trial was of such character as to effectively dispose of the merits of the case; it did not mean "finality" as used in the collateral rule test under *Cohen*.

Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), followed and relied on the *Dickinson-Gillespie* formulation, but in a matter involving a question *collateral* to the merits of the case. Judge Kaufman seems to have reasoned that because of the economic considerations involved in the size of appellant's claim, the denial of the class action was practically the final decision in the case, and therefore, it was proper to invoke the balancing of interests test to determine if this point was the proper place for the appeals court to step into the litigation. Piecemeal litigation seemed unlikely and the demands of justice in the case compelled Judge Kaufman to conclude Section 1291 applied.

Subsequently, the Second Circuit commented upon *Eisen* in *Caceres v. International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970). In explaining the history of the prior case, it stated that the earlier decision was based upon *Cohen* and *Roberts*, even though the court made perfectly clear that the test involved had nothing to do with collateral questions, but with *Dickinson-Gillespie's* balancing of interests test. Such a reinterpretation of the cases obviously was bound to cause confusion and the ultimate obfuscation of *Cohen* and the collateral order rule. More importantly, it is clear that by the time the Second

Circuit arrived at *Caceres* it no longer really struck a balance.[3] Rather it had converted the *Dickinson-Gillespie* doctrine into one question: is there enough money in the single claim that the case will proceed? That point is made perfectly clear by *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971), in which a party with a $386 claim was allowed to appeal a denial of a class designation, but a party with an $8,500 claim was not. One party was expected to be able to proceed; the other was not. (Id. at 1307)

Such an automatic test, so far removed from the original balancing of the inconvenience of piecemeal litigation against the denial of justice, bothered Judge Friendly who concurred with great reservation. (443 F.2d at 1307) I agree that such an arbitrary formulation hardly illuminates the underlying issues. My Brother Gibbons' discussion of whether Mrs. Hackett could continue this litigation in her individual capacity if she wished, illustrates the problems with the *Korn* test, and how arbitrary that test is. I believe the proper procedure is to return to the principles from which *Korn* arose.

In fact, under either the *Dickinson-Gillespie* doctrine or under the simplified test of *Korn*, Mrs. Hackett has properly brought her appeal before this court. Suffice it to say at this point that under the present Second Circuit *Korn* test, if Eisen's $70 claim was too small to carry forward his class action, then this $9 claim is also too small.

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3. Judge Feinberg in *Caceres* raises the interesting point that the ABA Special Committee Federal Rules of Civil Procedure, 38 F.R.D. 95, 104-5 (1965), thought that questions involving designation of class actions should be brought up under 28 U.S.C. §1292 (b), and therefore there is an implication that the automatic appeal under Section 1291 was not to be freely utilized. While there is merit in Judge Feinberg's suggestion, the ABA report involves all the changes made in Rule 23 in 1966, many of which might well not be "important" in any particular litigation and therefore appealable only under Section 1292(b).

More importantly, under the *Dickinson-Gillespie* formulation, if I analyze the balance of potential piecemeal litigation against the denial of justice, I must again conclude that Mrs. Hackett's appeal should be heard now. Although the majority strongly suggests that Mrs. Hackett could continue this case on her own, it is clear that the potential for piecemeal litigation here is small. She is unlikely to continue the litigation and that is all that is important in striking the balance. Moreover, there are strong questions of justice involved. When the 1966 amendments to the Federal Rules were issued, the A.B.A. Special Committee on Federal Rules of Procedure stated that it hoped that there would be adequate appellate review of many of the questions surrounding the amendments to Rule 23 so that the contours of the amendment would be quickly shaped and clarified. 38 F.R.D. 95, 104 (1965). Besides these general societal interests, the individual needs of justice for Mrs. Hackett and her class are best served by immediate appellate review. As I have stated before, the character of a suit for $9 is simply not the same as that for several million dollars. It is in the interest of both the defendants and the plaintiff to know precisely where they stand with regard to the amount being litigated.

Finally, for purposes of properly understanding the distinctions between *Cohen* and *Eisen*, it is important to note what the cases did *not* say. Many of the Cohen cases involve situations which effectively terminate the litigation. For instance, in *Roberts*, the failure to be granted leave to proceed in forma pauperis was most likely to terminate litigation. However, in holding that the denial was appealable, the Court merely cited *Cohen*, which made no mention of the possibility that the collateral order would have ended the litigation. That omission is significant because the "importance" criterion established in *Cohen* left

open the possibility of balancing such a factor. In fact, the collateral order in *Cohen* requiring posting of a bond presumably had precisely that litigation ending effect. (Note, Appealability, 70 COLUM. L. REV. 1292, 1304 (1970)) Although at least one *Cohen* case has weighed the "importance" question on the basis of its effect in terminating litigation (*Redding & Co. v. Russwine Construction Corp.*, 417 F.2d 721, 726 (D.C. Cir. 1969)), it should not generally be thought to be necessary to the *Cohen* test.

Eisen cites *Roberts* without comment but presumably for the proposition that collateral decisions that end litigation are appealable. However, its primary test is the one developed in *Dickinson* and *Gillespie* and there is never any mention made of the actual *Cohen* rule that all important collateral matters irreparably affecting the litigation are appealable.

In any case, under either the collateral order doctrine announced in *Cohen* or the termination of litigation doctrine of *Dickinson-Gillespie*, I am compelled to find that the Supreme Court mandates the decision denying confirmation of the class be held appealable.

II.

The majority opinion suggests, in effect, that the refusal of the district court to confirm the class action does not necessarily terminate the plaintiff's suit; that although the class action may not be maintained, the suit may be pressed on an individual basis by Mrs. Hackett and others similarly situated. Reference is made to several federal statutes which provide for an award of reasonable attorneys' fees should Mrs. Hackett or others who follow desire to press forward.

Indeed, the statute under which Mrs. Hackett proceeded not only provides for reasonable attorneys' fees but also provides that one may sue "without regard to the amount in controversy." Nevertheless, I cannot believe that a capable attorney would press forward a complex anti-trust action when the amount in controversy is nine dollars.[4] If attorneys could be found willing to go forward on an individual basis with Mrs. Hackett's claim, and the claims of others who allegedly comprise the aggrieved class, dockets would indeed be intolerably overcrowded. Nor does the growth of public legal services, also cited by the majority, provide the means by which an individual litigant might secure legal representation. No publicy supported legal service organization could explain or justify the time and effort required to press a nine dollar anti-trust suit. Moreover, publicly supported legal service organizations generally may not proceed on a contingent fee basis.[5]

The majority suggests that instead of allowing interlocutory appeal as of right we weigh the effectiveness of "alternative discretionary appellate remedies" for consumer class actions. As I have already indicated, the appeal before us is not interlocutory. Further, "the alternative discretionary appellate remedies" suggested offer little consolation to Mrs. Hackett since she has been denied by the district court the opportunity to use them. Nor do I see any necessity for restricting her to mandamus for appellate review. It has been sparingly applied for such purposes and I am not convinced that it is a reasonable alternative for even an interlocutory appeal. Moreover the variety and number of alternative remedies leaves no

4. 3B Moore's Federal Practice ¶23.97, at 23-1952.

5. Guidelines for Legal Services Programs, Community Action Program, OEO, ¶6700.35.

assurance that denial of appeal under §1291 will serve the majority's purpose to protect "the federal appellate works from being overwhelmed by interlocutory appeals."

On the assumption that this is an interlocutory appeal and not an appeal from a final order, the majority expresses the fear that this court may be plagued by interlocutory review. Until we have further experience with class actions, it seems to me that this fear is premature. As the majority points out, its decision operates within a very limited sphere. Indeed, as they say, "no other circuit has had occasion to either adopt or expressly reject the 'death knell' rationale." Moreover, anti-trust litigation seems to be growing slowly in comparison with other fields. For example, in terms of the civil cases commenced in the United States District Courts, civil rights showed an increase of 28.9% in fiscal 1971 over fiscal 1970, commerce cases a 77.9% increase, and securities, commodities and exchange cases a 62% increase,[6] while anti-trust cases rose by a mere 15%.[7] Further, if it is true that there are "alternative discretionary remedies" which may bring to us the issues in cases similar to this one, it would appear that denying review in this particular case, while allowing review in others, does nothing except to arbitrarily shut the door to this one.

Some comment is in order on our recent decision in *Greene v. The Singer Co.* (Civil No. 71-1835, 3d Cir., Filed Nov. 2, 1971). Of course, I agree with the majority that the *Greene* case differs from the case at bar in terms of the factual situation presented. However, I cannot agree that the rule which dictated our conclusion in *Greene* would warrant a different decision in the case now before us.

---

6. Annual Report of the Director (1971), Administrative Office of the United States Courts, II-28.

7. Id. at II-107.

Greene was, in fact, a reaffirmance of the rules which were first articulated in *Cohen*, and which have been discussed above. As we said in *Greene:* "To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes." (Slip opinion p. 3) Similarly, in the case now before us, as I have already pointed out, denying appeal in this case will undoubtedly "for practical purposes, deny [Mrs. Hackett] the reality of appellate processes."

It should also be noted that the rationale which motivated the *Greene* case has been impaired by the decision which the majority takes today. The court in *Greene* did not decide that a failure to allow appeal *would* deny appellee the "reality of appellate process." It found only that it *might* deny appellee that reality. It did not hold that if the appeal did not go forward, appellant *would* suffer irreparable injury; it held only that there existed "the *possibility* of irreparable *injury*." (Emphasis supplied) Mrs. Hackett has at least shown this much.

One final point deserves attention. While the small size of these claims, considered individually, means that for all practical purposes this law suit ends here, the small size does not mean that these claims are insignificant. In fact, this case may illustrate the usefulness of a class action in the litigation of small consumer claims.[8] Bread is an essential household staple which is purchased regardless of the economic level of an individual family. Those whose incomes are meager feel the pinch of price fixing in such an area. Yet they are the ones who most need to combine resources in order to pursue their right in the courts.

8. Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970), reaffirms this circuit's belief in the value of such class actions for consumer cases.

I would hold therefore that the order of the district court entered July 30, 1970 comes within the collateral rule of *Cohen*, supra, or in the alternative is final under *Dickinson-Gillespie*, and therefore is an appealable order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,320

KATHLEEN HACKETT, on behalf of herself and all others similarly situated,
Appellant

vs.

GENERAL HOST CORPORATION, CONTINENTAL BAKING COMPANY, WILLIAM FREIHOFER BAKING COMPANY, HUBER BAKING COMPANY, INC., SCHAIBLE'S BAKERY, STROEHMANN BROTHERS COMPANY AND WARD FOODS, INC.

(D. C. Civil Action No. 70-364)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present:

ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal in this case be, and the same is hereby dismissed. Costs taxed against appellant.

ATTEST:
Thomas P. Quinn
Clerk

January 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 70-364

COMPLAINT, CLASS ACTION
JURY TRIAL DEMANDED

KATHLEEN HACKETT, on behalf of herself and all others similarly situated,

Plaintiff

v.

GENERAL HOST CORPORATION, CONTINENTAL BAKING COMPANY, WILLIAM FREIHOFER BAKING CO., HUBER BAKING COMPANY, INC., SCHAIBLE'S BAKERY, STROEHMANN BROTHERS COMPANY and WARD FOODS, INC.

COMPLAINT

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U.S.C. §15), to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for injuries sustained by plaintiff and other members of the class represented by her, by reason of defendant's violations, as hereinafter alleged, of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. §§1 and 2), commonly known as the Sherman Act.

2. Plaintiff, Kathleen Hackett, is an individual and resides at 1220 North 4th Street, Philadelphia, Pennsylvania.

During the time period covered by this complaint, plaintiff purchased the products defined in the complaint, produced and distributed by one or more of the defendants named herein.

CLASS ACTION ALLEGATIONS

3. Plaintiff is a consumer who has purchased bread at retail and is representative of a class as defined by Rule 23(b)(3) of the Federal Rules of Civil Procedure and brings this action on behalf of the entire class.

A. The class consists of all individual consumers situated in the Philadelphia Market, as hereinafter defined, who have purchased at retail, for their own consumption and consumption by members of their household and not for resale, the products described, within the period of suit, and who have sustained damages as the result of the conspiracy herein alleged. Plaintiff cannot state with specificity the size or approximate size of the class. According to the 1960 Census, there were in excess of 6,000,000 people residing in the Philadelphia Market. Plaintiff believes that the vast majority of them were, at all times relevant hereto, consumers of bread, but does not know what proportion were purchasers as defined above.

B. Plaintiff will fairly and adequately represent and protect the interest of the class. Plaintiff is the head of a household; is employed as a Field Representative by The Urban League; is a member of the Board of Directors of The Health and Welfare Council, Inc.; a member of the Board of Directors and an officer of the Philadelphia Tutorial Project; a member of the Lower Kensington Civic Association; a member and former Director of The Ludlow Civic Association; a former representative of Area E to the Philadelphia Anti-Poverty Action Commission; and a former Director of The Jefferson Neighborhood Council (no

longer in existence). Plaintiff was also featured in the award-winning television film, "Who Speaks For The Poor".

C. With the exception of the precise amount of damages to be awarded to each member of the class, all questions of law and fact are common to the class.

D. Because all questions of law and fact, except as to the precise amount of damages to be awarded to each member of the class, are common to all members of the class, common questions clearly predominate. A class action is superior to available methods for the fair and efficient adjudication of the controversy because:

(1) There is no reason to believe that members of the class have an interest in individually controlling the prosecution of separate actions. To the contrary, unless the action is prosecuted as a class action, the members of the class will as a practical matter be foreclosed from securing recovery of the damage individually sustained as a result of defendants' conduct.

(2) To the best of plaintiff's knowledge, no separate actions have been instituted by any member of the class.

(3) Because of the size of the class, the prosecution of separate actions by the individual members of the class would give rise to an undesirable multiplicity of virtually identical suits, excessively burdening both the Courts and the parties. A class action is the fairest and most efficient method of adjudicating the numerous claims.

(4) Plaintiff does not anticipate any difficulty in the management of this suit as a class action. Similar class actions have been brought on behalf of consumers. At the appropriate time provision can be made for adequate

notice to the members of the class and procedures established for the submission of claims.

4. The defendents, each of which transacts business and is found in the Eastern District of Pennsylvania, are the corporations named below. Each defendant is organized and exists under the laws of the state, and has its principal place of business in the city indicated below:

Name of Corporation	*State of Incorporation*	*Place of Business*	*Hereinafter Referred To As*
General Host Corporation	New York	New York, New York	General Host
Continental Baking Company	Delaware	Rye, New York	Continental
William Freihofer Baking Co.	Delaware	Allentown, Pennsylvania	Freihofer
Huber Baking Company, Inc.	Delaware	Wilmington, Delaware	Huber
Schaible's Bakery	Pennsylvania	Easton, Pennsylvania	Schaible
Stroehmann Brothers Company	Pennsylvania	Williamsport, Pennsylvania	Stroehmann
Ward Foods, Inc.	New York	New York, New York	Ward Foods

5. Defendant, General Host Corporation, is the successor to General Baking Company, its corporate name, style and title having been adopted on or about April 20, 1967. Whenever the activities, undertakings, arrangements or agreements of the defendants are alleged to have occurred before said date, such reference shall be deemed to include the corporation and its predecessor, General Baking Company.

6. Defendant, Ward Foods, Inc., is the successor to Ward Baking Company, its present corporate name, style and title having been adopted on or about May 22, 1964.

Whenever the activities, undertakings, arrangements or agreements of the defendants are alleged to have occurred before said date, such reference shall be deemed to include the corporation and its predecessor, Ward Baking Company.

7. As used herein:

(a) "Bread" means all sizes and weights of pan-baked bread; and

(b) "Philadelphia Market" means the counties of Bucks, Berks, Chester, Delaware, Lehigh, Montgomery, Northampton and Philadelphia in the Commonwealth of Pennsylvania; the counties of Atlantic, Burlington, Cape May, Cumberland, Gloucester, Salem and the southern portion of Mercer, Monmouth and Ocean counties in the state of New Jersey; and the northern portion of New Castle County in the State of Delaware.

8. During the period of time covered by the complaint, each of the defendant corporations, or the predecessors thereof, produced at its baking plant or plants bread which was sold or distributed in the Philadelphia Market.

9. Substantial quantities of ingredients used in the production of bread sold or distributed by the corporate defendants in the Philadelphia Market are shipped in a continuous and uninterrupted flow of interstate commerce to the baking plants of the corporate defendants located in Delaware, Maryland, New Jersey and Pennsylvania, from states other than those in which such baking plants are located.

10. Substantial quantities of bread sold or distributed by the corporate defendants in the Philadelphia Market are produced in states outside the state in which said bread is sold or distributed, and are shipped into such state in a continuous and uninterrupted flow of interstate commerce.

11. Total sales of bread in the Philadelphia Market by the corporate defendants during the period of time covered by this complaint have been at least $40,000,000 annually.

12. Most of the bread produced and sold by the corporate defendants in the Philadelphia Market during the period of time covered by this complaint was sold under the brand names, trade names or trade marks of the defendants.

13. Various corporations, firms and individuals not made defendants in this complaint participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

14. For many years past, the exact times being unknown to the plaintiff, but at least as early as 1964 and continuing thereafter at least until March of 1968, the defendants and co-conspirators engaged in a combination and conspiracy in restraint of the previously described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §1), commonly known as the Sherman Act.

15. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been to raise and maintain prices of bread and to fix and stabilize other terms and conditions for the sale of bread in the Philadelpia Market.

16. In furtherance of the aforesaid combination and conspiracy, the defendants and co-conspirators did various things, including things to raise, fix, stabilize and maintain the retail price of bread in the Philadelphia Market.

17. Plaintiff had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have

led to the discovery thereof, until the return of an indictment and the commencement of a civil action by the United States on March 13, 1968 against the defendants. Plaintiff could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants to avoid detection and fraudulently to conceal such combination and conspiracy.

18. On March 13, 1968, the United States of America instituted Criminal Action No. 23200 and Civil Action No. 68-558 in the United States District Court for the Eastern District of Pennsylvania against the defendants named herein. By indictment and complaint, the United States charged that beginning at least as early as 1964 and continuing thereafter up to and including the return date of the indictment, March 13, 1968, the defendants herein and other co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the Philadelphia Market with respect to bread, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, (15 U.S.C. §§1 and 2), commonly known as the Sherman Act. The United States further charged therein that the defendants and other co-conspirators, for the purpose of forming and effectuating said combination and conspiracy, had done, among other things, those acts alleged herein in paragraphs 14-16, inclusive.

19. As of December 8, 1969, defendants in the Criminal Action filed and had accepted pleas of nolo contendere.

20. During the period from at least 1964 through 1968, plaintiff and other members of the class were retail consumers of bread and purchased bread produced and sold by one or more of the defendants. By reason of the defendants' conspiracy hereinabove alleged, plaintiff's purchases and

those of the other members of the class were made at prices higher than the prices which they would have had to pay under natural conditions of competition in the absence of any such conspiracy and plaintiff and the other members of the class have thereby been injured and damaged. Plaintiff is unable to state her damages with precision at the present time, since such a determination will require discovery of and analysis of an accounting from defendants' books and records.

WHEREFORE, Plaintiff demands:

(a) Judgment against defendants and in favor of plaintiff and each member of the class of consumers which she represents for three-fold the damages determined to have been sustained by each plaintiff respectively, together with the costs of suit, including a reasonable attorney's fee.

(b) That the defendants be enjoined from continuing the acts, conduct and conspiracy hereinbefore alleged; and

(c) Such other and further relief as may appear necessary and appropriate.

/s/ SEYMOUR KURLAND
Seymour Kurland
Judah Labovitz
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Philadelpia, Pennsylvania 19102
Attorneys for Plaintiff

Of Council:
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 70-364

KATHLEEN HACKETT, on behalf of herself and all others similarly situated

v.

GENERAL HOST CORPORATION, CONTINENTAL BAKING COMPANY, WILLIAM FREIHOFER BAKING CO., HUBER BAKING COMPANY, INC., SCHAIBLE'S BAKERY, STROEHMANN BROTHERS COMPANY and WARD FOODS, INC.

MEMORANDUM OPINION

WEINER, J. July 30, 1970

The pivotal issue in this case revolves around the question of whether this action for treble damages brought under the antitrust laws, 15 U.S.C. §§ 1-2 may be prosecuted as a class action pursuant to the provisions of Rule 23(a),(b) and (c).[1]

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1. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

The Complaint arises out of a plea of *nolo contendere* entered by the defendants and accepted by this court, charg-

1. (Con't)

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include

ing the defendants with having conspired to fix the price and terms of sale of bread in the Philadelphia market.[2] Reference to a treble damage action commenced by the City of Philadelphia[3] on behalf of itself and various other public and private institutions, alleging the indentical price-fixing conspiracy charged in the indictment and the court approved settlement of this civil action is also introduced for the purpose of establishing the validity of the plaintiff's anti-trust charge.

Kathleen Hackett, a consumer of bread, purchased from a retail outlet, seeks to have named as a class all individual consumers situate in the Philadelphia market, who have purchased at retail, for their own or for members of their household, pan baked bread. She asserts that there were six million consumers in the geographical area and that approximately 1.5 million people purchase from retail stores.

---

1. (Con't)

all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into sub-classes and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

2. *United States of America v. General Host Corporation, et al.*, Criminal No. 23200.

3. *City of Philadelphia v. General Host Corporation, et al.*, Civil Action No. 68-704.

The defendants argue that the class may not be maintained and in support of their position contend:

(a) Common Questions do not predominate over questions affecting individual members of the class.

(b) Substantial difficulties would be encountered in the management of the class action alleged.

(c) The proposed class cannot state a cause of action under section 4 of the Clayton Act.

The critical area of controversy relates to the problem of whether the difficulties likely to be encountered in the management of this case as a class action are likely to prove insuperable. If so, the class action cannot be maintained. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968); *Hawaii v. Standard Oil Company of California*, Civ. No. 2826 (D. Hawaii, 1969);[4] *United Egg Producers v. Bauer International Corporation*, 70 Civ. 194 (S.D. N.Y. 1970).[5] To the extent that this essentially factual question will be the guideline for a legal determination we now turn to a brief summary of the admitted facts.

The Philadelphia market consists of the City of Philadelphia, surrounding counties in Pennsylvania and a number of counties in Southern New Jersey and Delaware. The defendants sold or distributed their product to approximately 12,000 retailers consisting of supermarkets, grocery, dairy and delicatessen stores. As previously stated, there are about six million consumers and 1.5 million purchasers of bread. Plaintiff refers to various cases as authority to enable this court to entertain the cause of action as a class action, but none of these cases are applicable. In *Philadelphia Electric Company v. Anaconda American Brass*

4. Opinion filed May 27, 1969.

5. Opinion filed April 27, 1970.

Company, 43 F.R.D. 452, 462, 463 (E.D. Pa. 1968), Judge Fullam restricted the class to all governmental entities within the territory comprising the Eastern District of Pennsylvania and to all state governments and governmental entities having state wide jurisdiction and then to all cities in the United States having a population of over 50,000. He excluded from the class approximately 18,000 home builders as "too amorphous" to be regarded as a class". 43 F.R.D. at 463. *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 728 (N.D. Cal. 1967), involved approximately 900 plaintiffs who were all franchisees of the defendant. *State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559 (D. Minn. 1968), was instituted by eight different governmental entities against six steel companies. The class in *Green v. Wolf Corporation*, 406 F.2d 291 (2d Cir. 1968) consisted of 2,200 purchasers of stock. *Esplin v. Hirschi*, 401 F.2d 94 (10th Cir. 1968) concerns 200 defrauded securities purchasers.

State of West Virginia v. Chas. Pfizer & Co., Civil Action 240 (S.D. N.Y. 1968), is by far the strongest case in plaintiff's arsenal. For reasons which follow we think the circumstances presented by the case at bar furnish several bases for distinction. The fundamental difference that separates the instant case from *State of West Virginia* is that in the latter case a fund of $100,000,000 was offered by the defendants as a settlement of all claims, including as a class, all individual members of the consuming public who had purchased broad spectrum antibiotic products. The creation of the individual class was not presented to the court as an issue. In our opinion the acceptance by the court of a settlement proposal containing an unopposed suggested designated class is inconclusive and non-determinative of the issue raised by the plaintiff and will not serve as a legal precedent.

Our next inquiry is whether the management of this case is likely to prove insuperable. In *Eisen v. Carlisle & Jacqueline*, 391 F.2d at 572, Chief Judge Lumbard observed:

> "Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they ever intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of 70 [sic]. Rule 23 (b)(3) requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy, and requires that the Court consider 'the difficulties likely to be encountered in the management of the class action' in making its determination. See *Berley v. Dreyfus & Co.*, 43 F.R.D. 397 (S.D. N.Y. Dec. 22, 1967)."

We agree with the view expressed in the dissenting opinion of the Chief Judge. *Hawaii v. Standard Oil Company of California, supra,* is somewhat analogous to this case. In *Hawaii*, the plaintiff sought to maintain a class action under Rule 23 on behalf of every individual purchaser of gasoline within the State. In dismissing the class action count the Court stated:

> ". . . Now, we know that when it buys at retail . . . now, if they say that because that took place, that we are now ready to take on and give the Court the horrendous problem of every last one of the individuals throughout the State, or whoever were here during that period, who purchased gasoline at retail, and take on the burden of determining how much each and every one should be entitled to who finally came in under the class, I state that I see so many problems . . . I would

hold that, under the circumstances right now, the class action based upon the injury to every individual purchaser of gasoline in the State, to me at the present time, in the context of the pleadings, would be unmanageable."

In *United Egg Producers v. Bauer International Corporation, supra*, the court dismissed a class action instituted on behalf of all consumers of eggs in the United States.

". . . every doubtful case must be carefully reviewed and measured against the standards established by Rule 23 in the searching light of experience and practicability before a proper decision can be made upon the forseeable consequence of maintenance as a class action." *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967).

It is our considered opinion that under the facts of this case, the problem of management of the proposed class is clearly insurmountable. The class is so large that it would be unmanageable and could only result in many knotty, complicated and unnecessary problems.

ORDER

The plaintiff's request for confirmation of her action as a class action is DENIED.

IT IS SO ORDERED.

CHARLES R. WEINER,
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 70-364

KATHLEEN HACKETT, on behalf
of herself and all others similarly situated

v.

GENERAL HOST CORPORATION,
CONTINENTAL BAKING COMPANY,
WILLIAM FREIHOFFER BAKING CO.,
HUBER BAKING COMPANY, INC.,
SCHAIBLE'S BAKERY,
STROEHMANN BROTHERS COMPANY and
WARD FOODS, INC.

OPINION

WEINER, J. August 25, 1970

In an action for treble damages brought under the anti-trust laws, 15 U.S.C. §§ 1-2 the plaintiff sought to have named as a class all individual consumers of bread who are situated in the Philadelphia Market. On July 30, 1970, we entered an order denying the plaintiff's request for confirmation of her action as a class action. We have for our present consideration the plaintiff's request that we amend our order and provide certification for appeal. 28 U.S.C. § 1292(b). We have carefully considered plaintiff's argument but we are not persuaded that there is substantial ground for difference of opinion or that an immediate appeal from the order may materially advance the ultimate determination of this case.

CHARLES R. WEINER,
J.

STATUTORY PROVISIONS INVOLVED

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Local Rule 45 of the United States District Court for the Eastern District of Pennsylvania.

CLASS ACTIONS

In any case sought to be maintained as a class action:

(*a*) The complaint shall bear next to its caption the legend, "Complaint—Class Action."

(*b*) The complaint shall contain under a separate heading, styled "Class Action Allegations":

(1) A reference to the portion or portions of Rule 23, F.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(2) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

A. the size (or approximate size) and definition of the alleged class,

B. the basis upon which the plaintiff (or plaintiffs) claims

(i) to be an adequate representative of the class, or

(ii) if the class is comprised of defendants, that those named as parties are adequate representatives of the class,

C. the alleged questions of law and fact claimed to be common to the class, and

D. in actions claimed to be maintainable as class actions under subdivision (b) (3) of Rule 23, F.R.Civ.P., allegations thought to support the findings required by that subdivision.

(*c*) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c) (1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary pro-

cedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion before the same judge.

(*d*) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross claim alleged to be brought for or against a class.

Rules of Civil Procedure.

RULE 23.

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive

of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4). When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation

fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 23200
Filed: March 13, 1968

UNITED STATES OF AMERICA

v.

GENERAL HOST CORPORATION,
CONTINENTAL BAKING COMPANY,
WILLIAM FREIHOFER BAKING CO.,
HUBER BAKING COMPANY, INC.,
SCHAIBLE'S BAKERY,
STROEHMANN BROTHERS COMPANY,
WARD FOODS, INC.,
EARL E. CAMPBELL, OSCAR CLOUSER,
JULIUS HEIM, GEORGE F. HUBER, JR.,
HARRY B. KONN, LEO M. ROUSSEL,
W. R. SCHILLING, and JAMES T. SCOTT,
Defendants.

INDICTMENT

The grand jury charges:

I

DEFINITIONS

1. When used herein, the term:

(a) "Bread" means all sizes and weights of pan-baked bread; and

(b) "Philadelphia market" means the counties of Bucks, Berks, Chester, Delaware, Lehigh,

Montgomery, Northampton, and Philadelphia in the Commonwealth of Pennsylvania; the counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Salem, and the southern portions of Mercer, Monmouth, and Ocean Counties in the State of New Jersey; and the northern portion of New Castle County in the State of Delaware.

II

Defendants

2. The corporations named below are hereby indicted and made defendants herein. Each of these corporations is organized and exists under the laws of the State, and has its principal place of business in the city indicated below. Within the period of time covered by this indictment, each of these corporate defendants has engaged in the business of producing, selling, or distributing bread in the Philadelphia market:

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
General Host Corporation	New York	New York, New York
Continental Baking Company	Delaware	Rye, New York
William Freihofer Baking Co.	Delaware	Allentown, Pennsylvania
Huber Baking Company, Inc.	Delaware	Wilmington, Delaware
Schaible's Bakery	Pennsylvania	Easton, Pennsylvania
Stroehmann Brothers Company	Pennsylvania	Williamsport, Pennsylvania
Ward Foods, Inc.	New York	New York, New York

3. Defendant General Host Corporation is the successor of General Baking Company, its present corporate name, style, and title having been adopted on or about April

20, 1967. Whenever the activities, undertakings, arrangements, or agreements of the defendants are alleged in this indictment to have occurred before said date, it shall refer, insofar as the defendant General Host Corporation is concerned, to its predecessor General Baking Company.

4. Ward Foods, Inc. is the successor of Ward Baking Company, its present corporate name, style, and title having been adopted on or about May 22, 1964. Whenever the activities, undertakings, arrangements, or agreements of the defendants are alleged in this indictment to have occurred before said date, it shall refer, insofar as the defendant Ward Foods, Inc. is concerned, to its predecessor Ward Baking Company.

5. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time covered by this indictment, each has been associated with the defendant corporation, and in the position, indicated below:

Individual	*Defendant Corporation with which Associated*	*Position*
Earl E. Campbell	Continental Baking Company	Regional Vice-President
Oscar Clouser	General Host Corporation	Regional Manager, Bond Baking Co. Division
Julius Heim	Continental Baking Company	Manager, Norristown, Penn. Plant
George F. Huber, Jr.	Huber Baking Company, Inc.	President and General Manager
Harry B. Konn	Schaible's Bakery	Vice-President, Sales
Leo M. Roussel	Stroehmann Brothers Company	Manager, Norristown, Penn. Plant
W. R. Schilling	William Freihofer Baking Co.	President
James T. Scott	General Host Corporation	President, Bond Baking Co. Div.

III

Co-Conspirators

6. Various corporations and individuals not made defendants in this indictment participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

Nature of Trade and Commerce

7. During the period of time covered by this indictment, each corporate defendant produced at its baking plant or plants in the cities indicated below, bread which was sold or distributed in the Philadelphia market:

General Host Corporation	Philadelphia, Pennsylvania
Continental Baking Company	Paterson, New Jersey
	Norristown, Pennsylvania
William Freihofer Baking Co.	Allentown, Pennsylvania
	Wilmington, Delaware
Huber Baking Company, Inc.	Wilmington, Delaware
Schaible's Bakery	Easton, Pennsylvania
Stroehmann Brothers Company	Norristown, Pennsylvania
Ward Foods, Inc.	Newark, New Jersey
	Baltimore, Maryland

8. Substantial quantities of ingredients used in the production of bread sold or distributed by the corporate defendants in the Philadelphia market are shipped in a continuous and uninterrupted flow of interstate commerce to the baking plants of the corporate defendants from States other than those in which such baking plants are located.

9. Substantial quantities of bread sold or distributed by the corporate defendants in the Philadelphia market are produced in States outside the State in which such bread is sold or distributed, and are shipped into such State in a continuous and uninterrupted flow of interstate commerce.

10. Total sales of bread during the indictment period in the Philadelphia market by the corporate defendants have been at least $40 million annually.

V

Offense Charged

11. Beginning at least as early as January 1964, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been to raise and maintain prices of bread and to fix and stabilize other terms and conditions for the sale of bread in the Philadelphia market.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done these things which, as hereinbefore charged, they combined and conspired to do.

VI

Effects

14. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Prices of bread in the Philadelphia market have been raised and maintained at artificial, noncompetitive levels;

(b) Purchasers have been deprived of free and open competition in the sale of bread in the Philadelphia market; and

(c) Competition in the sale of bread in the Philadelphia market among the defendants and co-conspirators has been restrained.

VII

Jurisdiction and Venue

15. The aforesaid combination and conspiracy has been entered into and carried out in part within the Eastern District of Pennsylvania, within the five years preceding the return of this indictment.

Dated:

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FILE COPY

Supreme Court, U. S.
FILED
MAY 26 1972

No. 71-1370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

KATHLEEN HACKETT, *Petitioner*,

v.

GENERAL HOST CORPORATION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1370

KATHLEEN HACKETT, *Petitioner,*

v.

GENERAL HOST CORPORATION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether a district court's discretionary determination, under Rule 23 of the Federal Rules of Civil Procedure, that a class action seeking damages for alleged price fixing on behalf of 1,500,000 individual purchasers from 12,000 retail stores would be unmanageable is a final judgment appealable as of right under 28 U.S.C. § 1291, where means other than appeal under Section 1291 are available to obtain appellate review, the class action ruling can be considered on appeal from a final judgment on the merits, and the plaintiff and purported class representative did not act to terminate her action.

2. Whether, in view of the undisputed record facts in this case, the court below correctly held that the district court did not abuse its discretion under Rule 23 in refusing to confirm, as unmanageable, a class consisting of 1,500,000 individuals who purchased products from 12,000 different stores.

STATEMENT

Petitioner brought an action for damages against these respondents, which are bakers of bread, in her own behalf and claiming also to represent a class consisting of all purchasers of bread at retail in an 18-county metropolitan area. After full consideration of pleadings, memoranda, affidavits and exhibits addressed specifically to the question of the propriety of such a class, the district court determined that an action on behalf of such a class would be unmanageable. Though the result of such a determination was not dismissal of petitioner's own claim, she purported to appeal as from a final judgment, pursuant to 28 U.S.C. § 1291. The court of appeals dismissed her appeal for lack of finality and, treating the issue raised upon the professed appeal as upon a petition for a writ of mandamus, held that the district court did not abuse its discretion in rejecting the proposed class.

Petitioner's claim upon the discretionary attention of this Court rests largely upon mischaracterizations of the nature and effect of the decisions below,[1] and a

[1] Petitioner states, erroneously, that the district court rejected her proposed class "on the basis of a *per se* determination of unmanageability predicated on the size of the class alone, a ruling made without findings, discussion or a record upon which the determination could be grounded," and that, because of the court of appeals' "broad ruling" on the appealability of the district court's decision, "that decision is completely insulated from review and the case must founder" (Pet. 13).

rather full statement of the case is necessary to reveal how far astray petitioner has gone in her characterizations.

Petitioner professed to be suing an behalf of all of those in 18 counties in three states in and around Philadelphia who had purchased bread at retail at any time during a four-year period (A31). Although the complaint stated that the vast majority of some 6,000,000 or more persons living in that area were consumers of bread, it did not state how many of those consumers were purchasers and hence members of the proposed class. The complaint was uncertain in other respects also. Respondents sell some bread at retail, principally through their "thrift" stores. Mostly, however, they sell at wholesale, directly or through distributors, to supermarkets and other retail grocery stores that in turn sell to consumers. The complaint did not reveal whether the damages claimed related to direct purchases from respondents or to indirect purchases from grocers.[2] Moreover, the complaint did not reveal the amount sought as damages, either by petitioner or by the class.

Pursuant to a local rule establishing the machinery for making the determination whether an action may be maintained as a class action, the district court held a pretrial conference looking toward the development of an adequate record on which to base a determination. A pretrial order was entered providing for the submis-

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[2] The distinction between "direct" and "indirect" purchasers of respondents' products, which petitioner concedes is "obviously relevant" (Pet. 12), has a crucial bearing on standing to sue under the Clayton Act for treble damages based on an alleged overcharge. See p. 11 n. 14, *infra*.

sion of affidavits by the two sides in support of and in opposition to confirmation of the class.

Respondents submitted a number of affidavits from persons familiar with the baking industry and detailed studies of the wholesale baking industry. This record pictured a complicated market structure, lacking any uniform pattern, and established that the retail prices paid by the individual consumers for respondents' products reflected the independent pricing policies of some 12,000 retail stores in the area. The record also showed that the baking industry was a depressed industry, beset by rising costs and declining profit margins, and that wholesale price increases in the relevant period were attributable to increased costs. On the basis of this record respondents contended, *inter alia*, that, as a consequence of the size of the class and the market structure, petitioner's class action would not be manageable within the meaning of Rule 23(b)(3).

Although the proponent of a class action has the burden of proving that the prerequisites of Rule 23 have been satisfied,[2] petitioner made no effort to contest any of the facts established by respondents' affidavits and exhibits. In fact, petitioner submitted no affidavits at all and did not seek to inquire, by discovery or otherwise, into the showing respondents had made.

After extensive briefing and oral argument, the district court denied petitioner's request for confirmation

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[2] *See, e.g.*, DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp., 49 F.R.D. 35 (E.D. Pa. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968); Lucas v. Seagrove Corp., 277 F.Supp. 338, 347 (D. Minn. 1967).

of the action as a class action, setting forth in an opinion its reasons for that decision (A38-A44).

The district court noted that the proposed class might include at least 1,500,000 purchasers out of the 6,000,000 or more consumers and also noted the market structure in which the respondents' products were sold to individual consumers through "approximately 12,000 retailers consisting of supermarkets, grocery, dairy and delicatessen stores" (A41). After reviewing the cases and observing that the manageability of a class action was an "essentially factual question" (A41), the court, on the basis of "the admitted facts," expressed the "considered opinion that *under the facts of this case*, the problem of management of the proposed class is clearly insurmountable" (A44; emphasis added). The district court's ruling was thus narrow in scope and based on "the facts of this case."

Petitioner did not seek a determination pursuant to Fed. R. Civ. P. 54(b) in order to have a "final" judgment entered on the class action issue, from which an appeal could have been taken pursuant to 28 U.S.C. § 1291.[4]

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[4] A decision made final under Rule 54(b) is appealable under 28 U.S.C. § 1291, Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), and a Rule 54(b) determination may be made with respect to class action rulings. *See, e.g.*, Lockwood v. Hercules Powder Co., 172 F.2d 775, 777 (8th Cir. 1949); Hayes v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp., 396 F.2d 448, 449 (3d Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 497 n. 1 (5th Cir. 1968); Nolen v. Shaw-Walker Co., 449 F.2d 506, 508 (6th Cir. 1971); 9 Moore, *Federal Practice* ¶ 110.113[9], at 186 (2d ed. 1970). This Court indicated in *Sears*, moreover, that a district court's abuse of its discretion in deciding whether to make a Rule 54(b) finding is reviewable by the court of appeals. 351 U.S. at 437.

Petitioner did request the district court to make the certification required by 28 U.S.C. § 1292(b) to permit an interlocutory appeal, but the district court denied the request, after "carefully considering plaintiff's argument," on the ground that the statutory prerequisites for such a certification did not exist, *i.e.*, there was no substantial ground for difference of opinion as to a controlling question of law (the determination of non-manageability having been a discretionary one based on the particular facts of the case) and an immediate appeal would not "materially advance the ultimate determination of this case" (A45).[5]

Having sought unsuccessfully to obtain permission to appeal from the interlocutory order rejecting the proposed class, petitioner then undertook to treat the order as a final judgment appealable under 28 U.S.C. § 1291. She did so without having her own complaint dismissed, as other plaintiffs have done when confronted with district court rulings they believed precluded further litigation of a case.[6] Such a dismissal, pursuant to Fed. R. Civ. P. 41, would be a final judg-

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[5] When appropriate, certification under § 1292(b) has often been used as a means of obtaining interlocutory appellate review of class action issues. *See, e.g.*, Matthies v. Seymour Mfg. Co., 270 F.2d 365, 367 (2d Cir.), *rehearing denied on other grounds*, 271 F.2d 740 (1959), *cert. denied*, 361 U.S. 962 (1960); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567 (10th Cir. 1962); Hohmann v. Packard Instrument Co., 399 F.2d 711, 712 (7th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123 (5th Cir. 1969).

[6] *See, e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 679-81 (1958); United States v. Wallace & Tiernan Co., 336 U.S. 793, 794 & n.1 (1949); *cf.* Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921); Thomsen v. Cayser, 243 U.S. 66, 82-83 (1917).

ment appealable as of right; on the appeal the class action ruling could be challenged.

The court below held that the class action ruling of the district court was not a final decision appealable as of right under Section 1291. The court, moreover, treated the appeal as a petition for mandamus[7] and held that the district court's ruling "was within the limits of discretion allowed by Rule 23[(c)(1)]" and was not an abuse of that discretion (A15).

REASONS FOR DENYING THE WRIT

Petitioner had from the court below on mandamus the review of the district court's ruling as to the propriety of her class action that she sought on appeal. The question she presents as to whether the class action ruling was appealable is therefore academic and clearly does not warrant this Court's review. Moreover, the court of appeals was plainly right in holding that the district court acted within its discretion in refusing to confirm the class proposed by petitioner, and neither the propriety of that holding nor the adequacy of the record support for the district court's underlying discretionary determination involves any question of general importance deserving review by this Court.

In any event, the decision of the court of appeals that on the record of this case the district court's class action ruling is not appealable poses no issue warranting review by this court. The decision below is con-

[7] Class action rulings have been reviewed on mandamus. *See, e.g.*, Interpace Corp. v. City of Philadelphia, 438 F.2d 401 (3d Cir. 1971); Ernst & Ernst v. United States District Court, 439 F.2d 1288 (5th Cir. 1971), and CCH Fed. Secs. L. Rep. ¶ 93433 (5th Cir. April 3, 1972) (reviewing district court's refusal to dismiss class action claim on mandamus after district court denied certification under 28 U.S.C. § 1292(b)).

sistent both with the pertinent decisions of this Court and with the great weight of authority in other circuits. On the record here there is no reason for this Court to review that decision merely because the Court of Appeals for the Second Circuit in some opinions has ventured a limited exception to the orthodox rule that class action rulings are not final. Moreover, there are indications that the Second Circuit, recognizing the inherent difficulties in applying its "death knell" exception, may reconsider its decisions.

Finally, the decision below raises no important questions concerning administration of the antitrust laws or consumer class actions; the latter is a matter on which Congress is presently considering legislative action.

I. Because Petitioner Had Review of the District Court's Class Action Ruling on Mandamus, and the Court of Appeals' Decision That That Ruling Was Within the District Court's Discretion Is of No General Importance and Clearly Correct, the Question of Appealability Need Not be Reached, and Any Decision Thereon Would Not Affect the Result in This Case.

Petitioner presents two questions. One relates to the finality, for purposes of appeal, of at least some district court rulings on whether actions should proceed as class actions or only as individual actions; it is this question that is emphasized in the petition. But petitioner also presents a second question, in the very presentation of which she necessarily recognizes that the appealability question, on the record of this case, is quite academic.

For petitioner had review in the court of appeals of the class action ruling that she challenges; her second question is whether the court of appeals erred in sus-

taining the ruling upon review. Treating her appeal as a petition for mandamus, the court of appeals held that the district court's determination was "within the limits of discretion allowed by Rule 23[(c)(1)]," the rule under which class action determinations are made. The scope of review on appeal of the district court's discretionary determination would have been the same.[8] That determination, based upon the particular record of this case, is obviously of no general importance. Moreover, the court of appeals was plainly right in holding that the district court did not abuse its discretion in reaching the conclusion it did on the unmanageability of the class action proposed by petitioner.

Thus, the appealability question would not have to be reached by this Court. And if it were reached, the utmost that could be accomplished would be "a useless and profitless reversal," which would amount to "nothing more than an advisory opinion" since it would not affect the outcome of the case.[9] In such circumstances, as this Court has recognized, review of a question, however seemingly important, is unwarranted.

In an effort to impeach the court of appeals' ruling, petitioner makes a number of statements (*e.g.*, that the district court's rejection of the class action was based "solely on the size of the class") which are simply not

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[8] *See, e.g.*, Kansas City v. Williams, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953); Cypress v. Newport News Gen'l & Non-Sectarian Hospital Ass'n, 375 F.2d 648, 653 (4th Cir. 1967); Johnson v. Georgia Highway Express, Inc., *supra*, 417 F.2d at 1123; *cf.* Jumps v. Leverone, 150 F.2d 876, 877 (7th Cir. 1945); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 300 (2d Cir. 1969).

[9] *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fay v. Noia, 372 U.S. 391, 428-30 (1963).

supported by the record here, as we have shown in the statement above, a showing summarized in the margin.[10]

More importantly, petitioner's contentions demonstrate that, in the final analysis, she is asking this Court to review the adequacy of the district court's written opinion stating its refusal to confirm petitioner's class action (a step that could properly have been taken without any opinion [11]) in light of the facts of record in this case.[12] However, this Court does "not grant a cer-

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[10] Despite petitioner's claims (Pet. 12), respondents in fact proffered voluminous evidence which had a direct bearing on the facts described by petitioner as being "obviously relevant" to the question of manageability. Uncontradicted affidavits and exhibits portrayed, *inter alia*, the complexity of the distribution system, the direct and indirect nature of the purchase by class members, and the geographic concentration of class members (*see, e.g.*, court of appeals appendix, pp. 27a-64a, 83a-101a). The district court articulated its decision in a memorandum opinion, and that opinion was not based "solely on the size of the class," but was also based on the complexity of the distribution system involving purchases by class members of respondents' products through some 12,000 retail stores (A41).

[11] Fed. R. Civ. P. 52(a) (findings and conclusions required only on motions under Rules 12, 41(b) and 56); *see* Interpace Corp. v. City of Philadelphia, *supra*, 438 F.2d at 404. Even if findings and conclusions had been required, the court's opinion would have satisfied that requirement, *see* United States ex rel. R. W. Vaught Co. v. F. D. Rick Co., 439 F.2d 895, 899 (8th Cir. 1971); Christensen v. Great Plains Co., 418 F.2d 995, 1000 (8th Cir. 1969), especially since there were no disputed issues of fact. *Cf.* Jones v. New York Cent. R.R., 182 F.2d 326, 327 (6th Cir.), *cert. denied*, 340 U.S. 850 (1950).

[12] Whether a district court's decision is to stand or fall on the merits turns not on the presence, absence, or textual adequacy of the district court's findings and conclusions, but rather on whether they are "supported by the evidence." United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 (1964).

tiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). Such review by this Court in the instant case would be particularly inappropriate since the district court's refusal to confirm petitioner's sprawling class was consistent with the weight of relevant authority [13] and was so plainly sound in view of the size of the class, the complexity of the distribution system involving 12,000 retail stores, the different varieties and brands of products involved, the differences in local or regional markets, and the doubtful status of petitioner's standing to sue.[14]

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[13] Virtually every court to consider the manageability or propriety of a class action of this size asserting similar claims in a comparable market setting has ruled against the class action. *See, e.g.,* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71-74 (D. N.J. 1971); Reinisch v. New York Stock Exch., 52 F.R.D. 561 (S.D. N.Y. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 321 (S.D. N.Y. 1970); *cf.* Cannon v. Texas Gulf Sulphur Co., 47 F.R.D. 60 (S.D. N.Y. 1971).

[14] As noted above, petitioner has failed to show whether or to what extent her purchases of respondents' products were made directly or indirectly. In two other similar cases involving the baking industry courts have held that those purchasers who did not buy directly from one of the alleged co-conspirators do not have standing. City of Akron v. Laub Baking Co., CCH 1972 Trade Cas. ¶ 73930, at 91889 (N.D. Ohio April 18, 1972); City of Detroit v. American Bakeries Co., Civ. Nos. 33046,*et al.*, unreported (E.D. Mich. Feb. 16, 1971). *See also, e.g.,* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187, 1188 (3d Cir. 1971); City and County of Denver v. American Oil Co., 53 F.R.D. 620, 629-39 (D. Colo. 1971); United Egg Producers v. Bauer Int'l Corp., *supra,* 312 F. Supp. at 321.

II. The Decision of the Court Below Is Consistent With the Weight of Authority Among the Courts of Appeals and With the Pertinent Decisions of This Court, and There Is No Occasion To Consider Here the Propriety of Certain Decisions in the Second Circuit.

Petitioner attempts to portray the court below as having adopted some unprecedented "novel" and "all-embracing" ruling as to the appealability of class action rulings (Pet. 6, 7, 13), which is an aberrant departure from the decisions of other courts of appeals and in conflict with those decisions. Petitioner cites chiefly three decisions in the Second Circuit. This portrayal is far from reality. The decision below as to appealability accords with the great weight of authority in other circuits, including the Second Circuit. It is also altogether consistent with the decisions of this Court.

Various courts of appeals with almost perfect consistency have long held that class action rulings are not appealable, in the absence of a Rule 54(b) determination, the denial of an injunction under 28 U.S.C. § 1292(a)(1), a certification under 28 U.S.C. § 1292(b), or a final judgment of dismissal. Thus, the confirmation of a class action has been held not appealable by the defendant.[15] Similarly, where an asserted class action is limited in scope,[16] or is denied,[17] it has long been

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[15] *E.g.*, Walsh v. City of Detroit, 412 F.2d 226, 227 (6th Cir. 1969); Interpace Corp. v. City of Philadelphia, *supra*, 438 F.2d at 403.

[16] *E.g.*, Jumps v. Leverone, *supra*, 150 F.2d at 877.

[17] *E.g.*, Oppenheimer v. F. J. Young & Co., 144 F.2d 387, 388 (2d Cir. 1944); Lockwood v. Hercules Powder Co., *supra*, 172 F.2d at 777; All American Airways, Inc. v. Elderd, 209 F.2d 247, 249 (2d Cir. 1954); Rogers v. Alaska S.S. Co., 249 F.2d 646, 649-50 (9th Cir. 1957); Lippsett v. United States, 359 F.2d 956, 958-59 (2d Cir. 1966); Hayes v. Sealtest Foods Div. of Nat'l Dairy Prods. Corp., *supra*, 396 F.2d at 449; City of New York v.

the law—both before and after the 1966 revision of Rule 23 [18]—that such a ruling is not a final decision appealable as of right under Section 1291. Indeed, petitioner does not dispute that ordinarily a class action ruling is *not* a final decision appealable as of right under Section 1291. Such a ruling is like many other interlocutory rulings that may appear momentous when made in their relationship to the future conduct of a particular lawsuit or in the burdens or disadvantages they impose on a party. Those characteristics do not make such rulings appealable as of right.[19]

International Pipe & Ceramics Corp., *supra*, 410 F.2d at 299; Caceres v. International Air Transport Ass'n, 422 F.2d 141, 143-44 (2d Cir. 1970); Weingartner v. Union Oil Co., 431 F.2d 26, 29 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Korn v. Franchard Corp., 443 F.2d 1301, 1306-07 (2d Cir. 1971); Gosa v. Securities Invest. Co., 449 F.2d 1330, 1332-33 (5th Cir. 1971).

[18] Class action rulings were not final for purposes of appellate jurisdictional statutes prior to the 1966 amendments to Rule 23. Those amendments cannot have altered the nonappealable status of such rulings, for, as this Court held, the adoption of amended Rule 23 in 1966 "did not and could not" change jurisdiction under applicable statutes. Snyder v. Harris, 394 U.S. 332, 336-38 (1969); *see* Fed. R. Civ. P. 82.

[19] *E.g.*, Bancroft Nav. Co. v. Chadade S.S. Co., 349 F.2d 527, 529-30 (2d Cir. 1965) (discretionary order requiring security); Donlon Indus., Inc. v. Forte, 402 F.2d 935, 936-37 (2d Cir. 1968) (discretionary order requiring no security); Borden Co. v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969) (order requiring non-party to produce documents); Miller v. Pleasure, 425 F.2d 1205 (2d Cir. 1970) (order denying appointment of counsel to indigent plaintiff in civil action); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., CCH 1972 Trade Cas. ¶ 73817, at 91455-56 (2d Cir. Jan. 20, 1972) (order in class action said to have potential effect of eliminating so many members from the class that it would no longer be sufficiently numerous to remain a class action). *See generally* 9 Moore, *Federal Practice* ¶ 110.3 [6], at 173 & n. 3 (2d ed. 1970).

To the abundance of authority with which the decision below is in accord there are only two exceptions worth noting. Those are decisions of the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), and *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971).[20] The vitality of those decisions is doubtful even within the Second Circuit.

In *Eisen* the Second Circuit accepted an appeal under Section 1291 from an order dismissing a class action claim for damages under the federal securities and antitrust laws, where the plaintiff's individual claim was for $70. The panel's opinion disregarded prior contrary Second Circuit decisions not involving "newly amended Rule 23," then "assumed" that no competent lawyer would represent the plaintiff alone with his $70 claim, and concluded that to bar an "appeal now" would be "the death knell of the action" and end it for all practical purposes. The opinion did not discuss whether an attorney's fee might be awarded if plaintiff prevailed, nor did it discuss other alternatives, such as a Rule 54(b) finding, a Section 1292(b) certification, or an appeal from a voluntary dismissal.

Between *Eisen* and *Korn*, various panels of the Second Circuit dismissed appeals from class actions where the plaintiff's own claim was larger than that in

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[20] In Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969), a case much like *Eisen* on its facts, the question of appealability was not raised until the case was being considered on the merits, and the appealability issue was summarily disposed of in a footnote on the basis of *Eisen*, without any real analysis. 406 F.2d at 295 n. 6.

Eisen.[21] Then in *Korn*, a different panel expressed misgivings about the *Eisen* rule,[22] but the panel majority concluded that "*at the present time* we are not persuaded that we should reconsider our precedents and augment the onrushing tide of appeals." *Id.* at 1305. (Emphasis added.)[23] Accordingly, the panel applied *Eisen* narrowly to hold that a rejection of a class action was appealable in a case where the plaintiff's claim under the securities laws was for $386, but was not appealable in a similar case where the plaintiff's claim was for $8,500. The panel gave no indication as to where or how the dividing line should be drawn.

Chief Judge Friendly's concurrence in *Korn*, expressing doubt that the "death knell" doctrine "is truly workable or, indeed, is legally sustainable," evinced interest in *in banc* consideration of the issue "to formulate a rule that will avoid the necessity of such *ad hoc* judgments as have been required . . . and also will

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[21] *See* City of New York v. International Pipe & Ceramics Corp., *supra*; Caceres v. International Air Transport Ass'n, *supra*. The panel in *Caceres* expressed the view that the narrow *Eisen* exception "should not be expanded . . . ." 422 F.2d at 144.

[22] The panel stated that the *Eisen* exception "should [not] be too liberally applied," because (1) "courts of appeals are now being overwhelmed by an unprecedented number of appeals," (2) experience may show "that the 'death knell' rule is not 'truly workable,'" and (3) "we can rely on the good judgment and discretion of the district judges to apply amended Rule 23 fairly and sensibly." 443 F.2d at 1305-06.

[23] After *Eisen* was decided, this Court observed that there was "no compelling reason" to overturn a settled interpretation of a jurisdictional statute "in order to add to the burdens of an already overloaded federal court system." Snyder v. Harris, *supra*, 394 U.S. at 341. *See generally* Carrington, *Crowded Dockets of the Courts of Appeals: The Threat to the Function of Review of the National Law*, 82 Harv. L. Rev. 542 (1969).

afford equality of treatment as between plaintiffs and defendants." *Id.* at 1307.

If the Second Circuit does not reconsider and disapprove its own aberrant departures from the general understanding of the final judgment rule, there may be occasion for this Court to pass upon the so-called "death knell" exception. This case, however, is not an appropriate vehicle for consideration of the exception. We have already shown that the court of appeals' review of the district court's ruling on mandamus means that the question of the appealability of the district court's class action ruling need not be reached. More than that, although petitioner's counsel has made representations in the flattest of terms in the district court, the court of appeals and here that the action will come to an end unless petitioner's proposed class is confirmed, such representations do not establish that termination of the action is the necessary result of the ruling—a premise, as we understand, of the "death knell" exception and more generally an essential premise for treating as appealable any interlocutory order so affecting the future conduct of a case as to amount to a final disposition of it. *See Carroll* v. *United States*, 354 U.S. 394, 405 (1957).

In dismissing an appeal from a refusal to confirm a class action in *Gosa* v. *Securities Invest. Co.*, 449 F.2d 1330 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit said that, if the "death knell" exception is to be applied, each case "must depend on its own facts" and the crucial issue "is wholly a fact issue . . . ." 449 F.2d at 1332. If a plaintiff wishes to try to convert an otherwise interlocutory class action ruling into a "final" appealable decision by reason of the asserted "death knell" effect, then the plaintiff

had the burden of developing" the relevant facts. *Ibid.*[24]

The relevant facts were not developed here either. And, as we have pointed out (pp. 6-7, *supra*), petitioner did not suffer her action to be dismissed as she might have done to create an indubitably final judgment, on the appeal from which the class action ruling could have been asserted as error. In these circumstances, contrary to what petitioner asserts (Pet. 7-9), to treat as final and appealable an order that on its face is interlocutory would be inconsistent with the pertinent decisions of this Court, including the decisions in which the "death knell" exception purportedly finds its source.

This Court has said that " 'the final judgment rule is the dominant rule in federal appellate practice,' " deeply rooted in the common law and in federal statutes since the First Congress. *Di Bella* v. *United States*, 369 U.S. 121, 124, 126 (1962). The Court has recognized that enforcement of the final judgment rule may have adverse consequences for some litigants, *see, e.g., Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); *Parr* v. *United States*, 351 U.S. 513, 519-20 (1956), and may even result in some decisions "of grave importance to a litigant . . . never [being] satisfactorily reviewable." *Carroll* v. *United States*, *supra*, 354 U.S. at 406.

If exceptions to the final judgment rule are needed, however, this Court has said it is generally for Congress to make them, as it has done in various circumstances. *Carroll* v. *United States*, *supra*, 354 U.S. 407;

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[24] Among the relevant issues noted in *Gosa* were: the expense of litigation reasonably to be anticipated; the plaintiff's degree of solvency; the likelihood of recovery of attorney fees; and the potential amount of claims of other class members. 449 F.2d at 1332.

Di Bella v. *United States*, *supra*, 369 U.S. at 124. Any judge-made exception—especially one that involves the drawing of such wavering lines as the Second Circuit's "death knell" exception—creates uncertainty, and litigants face the undesirable risk that a failure to appeal from a particular ruling when it is made will result in a waiver of the right to appeal after a final judgment. *See Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956)

Petitioner is wrong when she contends that, in declining to apply a "death-knell" exception here, the court below acted inconsistently with *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). There this Court recognized a "small class" of interlocutory rulings which may be treated as "final" for purposes of appeal. *Id.* at 545-47. The class is composed of rulings on matters "separable from, and collateral to, rights asserted in the action." In that case the district court ruling held appealable was on "a serious and unsettled" legal question relating to the applicability in a diversity suit in a federal court of a new state statute dealing with a requirement that certain litigants give security for costs and attorneys' fees. The ruling was one that would not be "merged in the final judgment" and thus would not be reviewable on any appeal from such a judgment. The Court emphasized that a different question would have been presented if the statute had been clearly applicable and the question involved only the exercise of discretion as to the amount of the security, "a matter the statute makes subject to reconsideration from time to time . . . ."

The ruling of the district court in this case is in no meaningful sense "separable from, and collateral to,

the rights asserted in the action." Adverse class action rulings may be reviewed on appeal from final judgments.[25] Moreover, the ruling involved no unsettled question of law but merely represented the district court's exercise of discretion in applying Rule 23 to particular facts and thus was altogether as interlocutory as the discretionary ruling under the state security statute hypothesized in the *Cohen* case.

The decision of the court below is completely consistent with the decisions of this Court.[26]

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[25] *See, e.g.*, Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); Cypress v. Newport News Gen'l & Non-Sectarian Hospital Ass'n, *supra*, 375 F.2d at 652-54; *cf.* Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968).

[26] Petitioner's claim that the decision below "cannot be reconciled" with Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), and Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), is not sound. *Gillespie* involved a district court order striking parts of a complaint on the basis of an interpretation of the Jones Act. The issue was presented to the court of appeals both by appeal and by a mandamus petition, and the court, in affirming on the merits, found it unnecessary to determine how the question should properly have been brought before it. In this Court the parties agreed that the decision in question was appealable and the issue of appealability was not briefed. *See* 379 U.S. at 152, 170 n. 6. In affirming the decision of the court of appeals this Court merely held that the case was "obviously marginal" as to being final and appealable under § 1291, but concluded that "now that the case is before us" it should be decided on the merits to lessen the eventual costs to the parties of further litigation. *Gillespie* laid down no broad rule with which the decision below conflicts. So it is with *Dickinson*. There the Court held that one party's appeal from the "final judgment" in a multi-party case, entered after post-trial proceedings concerning relief which did not involve the appellant, was untimely because any appeal by that party should have been taken from an earlier post-trial decision, which fully adjudicated the appellant's claims and which was in no sense "tentative, informal, nor incomplete." 338 U.S. at 514.

III. The Decision Below Does Not Conflict With Any Established "Policies" Concerning Consumer Class Actions or the Administration of the Antitrust Laws.

In an effort to amplify the significance of the narrow rulings of the district court and the court of appeals, petitioner contends (1) that they are in conflict with some "policy with respect to consumer class actions" which is "evolving" in some unspecified manner (Pet. 8), and (2) that they raise "important questions affecting the administration of the antitrust laws and other regulatory statutes . . ." (Pet. 9). Neither charge is warranted in this case.

The district court's decision was explicitly based on the facts of this case and has no necessary implications for other class actions—by consumers or by other plaintiffs—under the antitrust laws or other laws.[27] Moreover, since it is primarily a legislative function to strike a jurisdictional balance between the need to redress relatively small grievances and the plain fact that "courthouses are not coliseums," *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 297-98 (2d Cir. 1969), evolution of policy concerning consumer class actions in federal courts should occur primarily in the legislature. In fact, legislation concerning consumer class actions is actively being comprehensively studied by Congress at this time.[28]

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[27] In Hawaii v. Standard Oil Co., 92 S. Ct. 885 (1972), this Court noted that a class action on behalf of all individual purchasers of gasoline for treble damages under the antitrust laws had been rejected as unwieldy, and made no suggestion that that ruling was contrary to the purposes of the antitrust laws or to any "policy" concerning consumer class actions. *Id.* at 893.

[28] Consumer class action bills have been introduced in both houses in the present Congress. *See* H.R. 5630, H.R. 6315 and S. 984. Hearings have been held on S. 984. The Senate Commerce Committee has just completed a study proposing an extensive survey

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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and cost-benefit analysis of class action litigation, *Staff Review of Class Action Legislation*, Senate Comm. on Commerce, 92nd Cong., 2d Sess. (Comm. Print. April 1972), which the Committee is circulating for comments. *See* letter from Warren G. Magnuson, Chairman, Senate Comm. on Commerce, May 5, 1972 (copy attached as Appendix A to this brief). *See also* BNA A.T.R.R. No. 562, May 9, 1972, pp. A-1, D-1 to D-3.

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APPENDIX

APPENDIX

UNITED STATES SENATE

Committee on Commerce
Washington, D.C. 20510

May 5, 1972

Dear Friend:

Enclosed are two copies of a proposed survey of the actual experience with class action litigation under Federal Rule 23 and various similar state rules.

The Commerce Committee would appreciate your assistance in evaluating this proposed survey. The textual portion of this preliminary document (the bulk of which contains lists of attorneys and class action case descriptions) has a set of questions and describes in detail the direction of the proposed study. I would find it most helpful if you could take the time to respond to the questions in the textual portion and also to give me your general reaction to the scope of this study.

Enclosed is a postage free envelope for your use. You may find it easiest to make your comments directly in one copy of the staff review and return it to me.

Your assistance is appreciated.

Sincerely yours,

/s/ Warren G. Magnuson
Warren G. Magnuson
Chairman

WGM/mps